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No.

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

PRINCE S.J. WEBBER, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Was petitioner, an African-American, who was sentenced to forty years in prison for the crime of rape, denied due process of law when he was tried before a flawed jury panel, in that it numbered less than six members, they were not required to reach a verdict by a unanimous vote, they were not racially representative of the military community and petitioner was limited to a single peremptory challenge?

2. Can probable cause be found to exist for purposes of issuing a search warrant under the Fourth Amendment where the facts relied upon consist entirely of outwardly innocent acts lacking any inculpatory connection between the purported suspect and the commission of the crime?

3. Did the Air Force Court of Military Review correctly apply the test for legal sufficiency enunciated in *Jackson v. Virginia*, 443 U.S. 307 (1979), by minimizing the importance of exculpatory serological evidence, which should have rendered the findings of guilty legally insupportable?

4. May the Judge Advocate General of an Armed Force, who is not authorized to make appointments under the Appointments Clause of the Constitution, appoint commissioned officers to serve as trial and military appellate judges, on the theory that their appointment as commissioned officers already satisfies the Appointments Clause for both their judicial and non-judicial duties?

5. Does the Due Process Clause of the Fifth Amendment require that, in peacetime, military trial and appellate judges be appointed to their judicial duties for fixed terms?

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Constitutional Provisions Involved	2
Statement of the Case	2
Reasons for Granting the Writ	13
I. MINIMAL DUE PROCESS UNDER THE FIFTH AMENDMENT REQUIRES THAT NO PERSON FACING FELONY CHARGES BE SUBJECTED TO THE POSSIBLE LOSS OF LIFE OR LIBERTY BASED UPON A NONUNANIMOUS VERDICT OF A JURY PANEL CONSISTING OF LESS THAN SIX PERSONS REGARDLESS OF JURISDICTION, MILITARY OR CIVILIAN	14
II. OUTWARDLY INNOCENT ACTS LACKING ANY INCULPATORY CONNECTION BETWEEN A PURPORTED SUSPECT AND THE COMMISSION OF A CRIME, STANDING ALONE, SHOULD NOT SUFFICE TO ESTABLISH THE PROBABLE CAUSE NECESSARY TO JUSTIFY THE ISSUANCE OF A SEARCH WARRANT UNDER THE FOURTH AMENDMENT	18
III. EXCULPATORY SEROLOGICAL EVIDENCE PRESENTED BY THE PROSECUTION WAS MISCONSTRUED AND MINIMIZED BY THE LOWER COURTS, RENDERING THE FINDINGS OF GUILTY LEGALLY INSUPPORTABLE IN LIGHT OF THIS COURT'S TEST FOR LEGAL SUFFICIENCY AS ARTICULATED IN *JACKSON V. VIRGINIA*, 443 U.S. 307 (1979)	20
IV. THE METHOD OF APPOINTING MILITARY OFFICERS TO DUTY AS TRIAL AND APPELLATE JUDGES VIOLATES THE APPOINTMENTS CLAUSE OF THE CONSTITUTION AND THE LACK OF ANY FIXED TERM FOR THOSE JUDICIAL OFFICES VIOLATES THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT	22

Page

Conclusion 30

Appendix A 1a

Appendix B 2a

Appendix C 11a

TABLE OF AUTHORITIES

Cases

SUPREME COURT

Ballew v. Georgia, 435 U.S. 223 (1978) 15, 17, 18

Batson v. Kentucky, 476 U.S. 79 (1986) 17

Buckley v. Valeo, 424 U.S. 1 (1976) (per curiam) 12, 23, 26

Burch v. Louisiana, 441 U.S. 130 (1979) 16, 18

Burns v. Wilson, 346 U.S. 137 (1953) 15, 18

Duren v. Missouri, 439 U.S. 357 (1979) 17

Ex parte Milligan, 71 U.S. [4 Wall.] 2 (1866) 16

Ex parte Quirin, 317 U.S. 1 (1942) 16

Freytag v. Commissioner, 111 S.Ct. 2631 (1991) 23, 24

Henry v. United States, 361 U.S. 98 (1921) 19

Illinois v. Gates, 462 U.S. 213 (1983) 19, 20

Jackson v. Virginia, 443 U.S. 307 (1979) 20, 21

Kahn v. Anderson, 255 U.S. 1 (1921) 16

Matthews v. Eldridge, 424 U.S. 319 (1976) 13, 28

Medina v. California, 112 S.Ct. 2572 (1992) 13, 28

Middendorf v. Henry, 425 U.S. 25 (1976) 27, 29

O'Callahan v. Parker, 395 U.S. 258 (1969) 16

Palmore v. United States, 411 U.S. 389 (1973) 13

Rostker v. Goldberg, 453 U.S. 57 (1981) 27

Shoemaker v. United States, 147 U.S. 282 (1893) ..... *passim*

Solorio v. United States, 483 U.S. 435 (1987) 9, 23

Strauder v. West Virginia, 100 U.S. 303 (1880) 17, 18

Taylor v. Louisiana, 419 U.S. 522 (1975) 17

Tumey v. Ohio, 274 U.S. 510 (1927) 29

United States v. Raddatz, 447 U.S. 667 (1980) 28

United States ex rel. Toth v. Quarles, 350 U.S. 11 (1955) 13

Whelchel v. McDonald, 340 U.S. 142 (1950) 16

Cases: Page

FEDERAL CASES

Mendrano v. Smith, 797 F.2d 1538 (10th Cir. 1986) 15, 16
Watson v. McCoffer, 782 F.2d 143 (10th Cir. 1986) 28

MILITARY CASES

Dettinger v. United States, 7 M.J. 216 (C.M.A. 1979) 10
United States v. Brown, 28 M.J. 470 (C.M.A. 1989) 10
United States v. Cole, 31 M.J. 270 (C.M.A. 1990) 10
United States v. Graf, 35 M.J. 450 (C.M.A. 1992) 10, 11
United States v. Hodge, 26 M.J. 596 (A.C.M.R. 1988) ... 18
United States v. Maharajh, 28 M.J. 797 (A.F.C.M.R. 1989) 9
United States v. McClain, 22 M.J. 124 (C.M.A. 1975)... 18
United States v. Ohrt, 28 M.J. 301 (C.M.A. 1989) 9
United States v. Weiss, 36 M.J. 224 (C.M.A. 1992), *cert. granted*, 61 U.S.L.W. 3783 (May 24, 1993) ..... *passim*

Constitutional Provisions:

U.S. Const. Art. I, § 8, cl. 14 15
U.S. Const. Art. II, § 2, cl. 2 ..... 2, 23
U.S. Const. amend. IV 19
U.S. Const. amend. V ..... *passim*
U.S. Const. amend. VI 14-16
U.S. Const. amend. XIV 14

Federal Statutory Provisions:

10 U.S.C. § 867a (Supp. III 1991) 2
28 U.S.C. § 1259(3) (Supp. III 1991) 2

Uniform Code of Military Justice:

Art. 16(1), 10 U.S.C. § 816(1) 15
Art. 18, 10 U.S.C. § 818 9
Art. 19, 10 U.S.C. § 819 9
Art. 26, 10 U.S.C. § 826 8
Art. 48, 10 U.S.C. § 848 10
Art. 51(a), 10 U.S.C. § 851(a) 14

Page

Art. 52(a), 10 U.S.C. § 852(a) 14
Art. 66, 10 U.S.C. § 866 ..... 8, 10
Art. 142, 10 U.S.C. § 942 7

Regulations:

Manual for Courts-Martial, United States, 1984, R.C.M. 1002 10

Miscellaneous:

William H. Cooke, *Courts-Martial: The Third System in American Criminal Law*, 1978 So.Ill.U.L.Rev. 1 9
Francis A. Gilligan & Frederic I. Lederer, *Court-Martial Procedure*, (1991) 9

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

PETITION FOR A WRIT OF CERTIORARI

The petitioner, Prince S.J. Webber, respectfully prays that a writ of certiorari issue to review the order and judgment of the United States Court of Military Appeals entered in his case on August 12, 1993.

OPINIONS BELOW

The unreported order and judgment of the United States Court of Military Appeals is found at Appendix A. The unreported opinion of the United States Air Force Court of Military Review, issued on July 14, 1992, is found at Appendix B.

JURISDICTION

The final order of the United States Court of Military Review was entered on August 12, 1993. The jurisdiction of

this Court is invoked under 28 U.S.C. § 1259(3) (Supp. III 1991) and 10 U.S.C. § 867a (Supp. III 1991).

CONSTITUTIONAL PROVISIONS INVOLVED

The Appointments Clause, U.S. Const. Art. II, § 2, Cl. 2, provides, in relevant part:

> The President . . . shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other officers of the United States, whose Appointments are not otherwise herein provided for, and which shall be established by Law; but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

The Fifth Amendment of the Constitution of the United States provides in relevant part:

> No person shall . . . be deprived of life, liberty, or property, without due process of law.

STATEMENT OF THE CASE

Petitioner was convicted by an Air Force court-martial of committing multiple acts of rape, burglary, indecent sexual assault and theft, all of which arose from a single incident. He was sentenced to be confined for forty years, to forfeit all of his pay and allowances, to be reduced to the lowest enlisted grade and to be dishonorably discharge from the Air Force. The conviction was based on circumstantial evidence as set forth in the paragraphs that follow.

On September 11, 1990, sometime between 10:00 and 10:30 p.m., a person appeared at the door of Airman Linda

Nantkes' room in her dormitory situated at Kirtland Air Force Base, New Mexico. Upon asking who was there, she heard a muffled reply that sounded like "Webber." After getting out of bed and cracking the door open, she observed a slender black male, approximately 20 years old, five feet tall, who informed her that her windows were open. She responded that she did not keep her windows open at night, to which the person replied, "Well, I mean your shades or your blinds are open." Some six to seven hours later, an intruder appeared in her room and raped her repeatedly after placing a pillow case over her head and threatening to break her neck if she did not stop screaming.

Although unable to positively identify the intruder, she described him as "possibly black", her same approximate height (five feet, four inches) and "a slender man, very slender." After the intruder departed, some forty-five minutes subsequent to his entry, Airman Nantkes went to her bathroom and noticed that the window was different from the way she had left it, observing that there was no screen on the window. She then called her non-commissioned officer in charge.

A rape protocol was immediately performed at the base hospital, following which Airman Nantkes was interviewed by investigators from the Air Force Office of Special Investigations (OSI). At that time she provided a description of the man who appeared at her room earlier the previous evening, who told her her blinds were open. A composite drawing was completed from her description. Items seized by the OSI from the crime scene included two sheets, a pillowcase, a bedspread, a blanket, a couple of towels, and a nightshirt. Latent fingerprints were lifted from the windowsill in the bathroom, the cabinet in the sink area and the shower door. The OSI also collected fiber prints, blood samples from Airman Nantkes (and subsequently, petitioner) and hair samples from the shower drain, pillowcase and bed sheets.

The OSI began looking for an individual named "Webber" for "questioning." The base "alpha roster" did not reveal anyone of that name, so a door to door search began in the dormitory where transient Air Force members resided. Eventually, at around 10:00 p.m. on September 12, 1991 (18 hours after the assault), OSI agents appeared at petitioner's room in the transient dormitory.

When asked if he knew anyone matching the description of the assailant, Airman Webber mentioned an individual who had resided down the hall a week earlier. He proceeded to take the agents to another room, however, the person found there did not match the description. The agents then asked petitioner for his military "ID" card for identification purposes, which disclosed the name "Webber." When the OSI agents asked if he would consent to a search of his room, Airman Webber declined.

Thereupon, Special Agent Walker initiated steps to obtain a search "authorization", the military equivalent of a search warrant. In the midst of this process, Airman Webber volunteered additional information to the agents which confirmed that he was the person who contacted Airman Nantkes the evening of September 11th about open blinds. He added that he had noticed an unidentified individual peering through the open blinds, explaining his efforts to warn the occupant.

This new information was added to all the information the OSI possessed at that time and relayed to the military magistrate who decided that probable cause existed to authorize a search of Airman Webber's room. The magistrate, Colonel Brannum, was told that Airman Nantkes was unable to describe her assailant's facial features, hair length or "anything" else regarding the assailant. Colonel Brannum authorized the search of Airman Webber's room for a nightgown, a towel and a pillowcase.

In the course of the search, a nightgown was found underneath a chair cushion. When it was seized, Special Agent Walker claimed that petitioner said, "Oh, shit." At trial, Airman Webber testified that he might have said that because he was shocked at this discovery.

A second search authorization was obtained "to search for anything else of evidentiary value." Airman Webber was also subjected to a sexual assault protocol. During the second search, agents found a handwritten note with Airman Nantkes' name and other information on it. Both oral search authorizations were subsequently merged into one written search authorization.

Forensic tests and examination of the physical evidence seized at the crime scene disclosed that petitioner was not the source any fingerprints found, nor was he the source of any hairs recovered from Airman Nantkes' nightshirt which she wore during the sexual assault. Semen stains found on the bedspread, sheets and nightshirt were compared with serological samples taken from Airman Nantkes and petitioner. Dr. Kotowski, a forensic serologist testified for the government at trial regarding the results of these comparisons.

He claimed that petitioner could possibly have been the source of the semen, while acknowledging that no item of evidence was found to disclose the presence of petitioner's PGM or Lewis blood type. In fact, the combination of ABO type O, Lewis type a-b+, and PGM type 1+ (found on the items of evidence) was inconsistent with petitioner's combined ABO type O, Lewis type a+b+, and PGM type 2+1+. Dr. Kotowski agreed that if the seminal stains found on the items of evidence came from a single individual, then petitioner would have to be eliminated as the source. No report of any DNA test can be found in the record, although a DNA test had been requested by petitioner. There is no indication the government was precluded from performing a DNA test.

Airman Webber testified at trial. He specifically denied committing the offenses or being in Airman Nantkes' room

that morning, maintaining that he awoke, dressed, jumped on his bicycle and left his dormitory for work at 5:15 a.m. that same morning. Others confirmed that he arrived at work before 6:00 a.m. to open up the shop so the B-1 aircraft he was working on could be inspected by employees from Rockwell. Airman Webber also presented evidence, unrebutted, of his character for peacefulness, truthfulness, law abidingness, respectful treatment of women, good military character and good work performance.

At trial, his defense counsel submitted motions requesting that one-third of the court member panel (jury) consist of African-Americans, that it total twelve in number, and that the defense be allowed two additional peremptory challenges. All these motions were denied. After challenges for cause and peremptory challenges were exercised, five members remained, and, consistent with established military law, they were instructed that two-thirds of the members must agree to reach a finding of guilty. In this case, that meant four of five members. It is unknown whether the members reached their findings of guilty unanimously or not.

On appeal, *inter alia*, Airman Webber raised the questions presented in this petition. The Air Force Court of Military Review denied any relief, affirming the findings and sentence. (Appendix B). The United States Court of Military Appeals granted Airman Webber's petition requesting review of that decision, citing Issues IX (judicial appointments) and X (judicial tenure) (Questions 4 and 5, respectively, in this petition). The Court of Military Appeals summarily affirmed the Court of Review's decision, without hearing oral argument or publishing a written opinion. (Appendix A).

With respect to Questions 4 and 5, this petition incorporates essentially the same brief which was submitted by United States Navy counsel in *Weiss v. United States*, No. 92-1482,

and by United States Army counsel in *Barkley v. United States*, No. 92-1646, and *Doucette v. United States*, No. 93-68. Like *Weiss*, this petition raises two closely related questions (Questions 4 and 5) which go to the heart of judicial independence for military trial and appellate judges, almost all of whom are commissioned officers and lawyers on active duty. Unlike judges appointed under Article I or Article III, military judges are not appointed by the President with the advice and consent of the Senate. Nor are they appointed for fixed terms.

Instead, military judges are selected and appointed by the Judge Advocate General of their respective service for such periods of time as the Judge Advocate General determines. The decision to select, transfer and reassign officers to and from their judicial duties is absolute and discretionary. In other words, those judges lack any protection from being removed and/or reassigned in the event the Judge Advocate General is not satisfied with their opinions, rulings or service. In the paragraphs that follow, the institutional framework of the military justice system will be developed, in conjunction with the rulings of the Court of Military Appeals, to demonstrate why the constitution has been violated.

A. Institutional Framework

Under Article I of the Constitution, Congress has established a three-tier system of military courts. At the top is the Court of Military Appeals, which has five civilian judges appointed by the President with the advice and consent of the Senate for fixed terms. Uniform Code of Military Justice art. 142, 10 U.S.C.A. § 942 (West Supp. 1992). The appointments and tenure of those judges are not at issue.

Below the Court of Military Appeals are four Courts of Military Review, one each for the Army, Air Force, Coast Guard, and Navy-Marine Corps. Presently, there are approxi-

mately 35 appellate military judges, who may be either military officers or civilians, all of whom are appointed by the Judge Advocate General of their respective service. In addition, for each service's Court of Military Review, the respective Judge Advocates General, or the Assistant Judge Advocates General, sign and submit the judges' annual fitness reports, which are used to decide promotions, duty assignments and susceptibility to involuntary early retirement. Although these courts are permanent courts, located in the Washington, D.C., area, none of the judges is appointed to a fixed term of office. Uniform Code of Military Justice art. 66 (a), 10 U.S.C. § 866 (a) (1988). The Courts of Military Review are typically divided into three-member panels, each with their detailed rules to manage and regulate dockets and the attorneys who practice before them. Absent waiver by an accused, the Courts of Military Review are required to review all cases in which a death sentence, confinement of one year or more, a dismissal, or a bad conduct or dishonorable discharge is adjudged. Uniform Code of Military Justice art. 66 (b), 10 U.S.C. § 866 (b) (1988).

Military trial judges preside at special courts-martial and, if qualified, at general courts-martial. Trial judges must be military officers, all of whom have been appointed as military officers by the President with the advice and consent of the Senate. However, their selection and appointment as a judge is made by the Judge Advocate General of their service. Like appellate judges, the trial judges have no fixed term of office. Uniform Code of Military Justice art. 26 (a)-(c), 10 U.S.C.A. § 826 (a)-(c) (1988). Military judges are assigned to a circuit and are supervised by a Chief Circuit Judge, who in turn reports to and is supervised by the Chief Judge of the Trial Judiciary of their respective service.

Each armed force assigns military judges as and when it sees fit. Judges often serve a two-, three- or four-year assignment.

However, a judicial assignment can be terminated at any time through decertification as a judge or by transfer to other duties at the discretion of the Judge Advocate General of the judge's armed force.[1]

A court-martial can try any offense committed by a member of the armed services regardless of when or where the offense took place, who the victim was, what was done, or why it was done—the sole requirement is that the accused was on active duty in the military at the time of the offense. *Solorio v. United States*, 483 U.S. 435 (1987). A general court-martial may impose sentences that include death, imprisonment for life or terms of years, total forfeitures of pay and allowances, and/or punitive discharges. 10 U.S.C.A. § 818 (1988). A bad conduct or dishonorable discharge carries with it a permanent stigma and it can have an adverse impact on civilian job opportunities, as well as on certain government-provided benefits. *See United States v. Ohrt*, 28 M.J. 301 (C.M.A. 1989); *United States v. Maharajh*, 28 M.J. 797 (A.F.C.M.R. 1989). Special courts-martial may impose up to six months confinement, and/or forfeiture of up to two-thirds pay per month for six months, and/or a bad conduct discharge. Uniform Code of Military Justice art. 19, 10 U.S.C. § 819 (1988).

Military trial judges are, for all practical purposes, the equivalent of United States District Judges and Magistrate Judges who preside over criminal trials in federal district courts. The drafters of the Uniform Code of Military Justice

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[1]William H. Cook, *Courts-Martial: The Third System in American Criminal Law*, 1978 So. Ill. U. L. Rev. 1, 17-18; 1 Francis A. Gilligan & Frederic I. Lederer, *Court-Martial Procedure* 14-31.00, at 518-19 (1991). The Judge Advocate General does not personally issue the actual orders for a transfer, but there is no doubt that, for all military lawyers, including military trial and appellate judges, he controls their actual duty assignments.

wanted military judges to be "real judges" as commonly understood in the American legal tradition. *United States v. Graf*, 35 M.J. 450, 465 (1992). The military trial judge has far-ranging discretionary powers, including the power to "rule on all interlocutory questions and all questions of law raised during the court-martial," to "[i]nstruct the members [jury] on questions of law and procedure which may arise," to "promulgate and enforce rules of court," and to "exercise contempt power." Uniform Code of Military Justice art. 48, 10 U.S.C. § 848 (1988). If the accused elects a bench trial, a general court-martial judge has even more discretion than does a district judge because the court-martial trial judge is not bound by the Federal sentencing guidelines. *See United States v. Brown*, 28 M.J. 470, 474 n. 3 (C.M.A. 1989); *see generally* Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 1002.

Courts of Military Review exercise all of the traditional powers of appellate courts including those under the All Writs Act. *See Dettinger v. United States*, 7 M.J. 216 (C.M.A. 1979). Additionally, these courts exercise an "awesome, plenary, *de novo* power of review." *United States v. Cole*, 31 M.J. 270, 272 (C.M.A. 1990). Thus, a court "[m]ay affirm only such findings of guilty and the sentence . . . as it finds correct in law and fact . . . [I]t may weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact." Uniform Code of Military Justice art. 66 (c), 10 U.S.C. § 866 (c) (1988).

B. Rulings of the Court of Military Appeals.

The Court of Military Appeals exercised its discretionary jurisdiction to consider petitioner's claims with respect to judicial appointment and tenure. Several days before it heard argument in *Weiss*, the Court of Military Appeals issued an opinion rejecting the due process claim. *United States v. Graf*,

35 M.J. 450 (C.M.A. 1992).[2] Then, on December 24, 1992, a sharply divided court rejected petitioner Weiss' Appointments Clause argument and affirmed the Navy-Marine Corps Court's decision. *United States v. Weiss*, 36 M.J. 224 (C.M.A. 1992), *cert. granted*, 61 U.S.L.W. 3783 (May 24, 1993).

In order to garner three votes, the majority below needed two separate and largely inconsistent rationales. Judge Gierke, writing the lead opinion for himself and Judge Cox, agreed that Congress may establish a military justice system, but that Congress cannot declare an exemption for military judges from the Appointments Clause. Therefore, Judge Gierke held that military judges are officers who must be appointed in accordance with the Appointments Clause, either by the President with the advice and consent of the Senate, by the President alone, by a Head of Department, or by a Court of Law. This proposition was endorsed by four of the court's five judges.

Judge Gierke then held that the Appointments Clause is satisfied when a military officer is commissioned by the President with the advice and consent of the Senate, because military judges are simply military officers with legal training. Relying on *Shoemaker v. United States*, 147 U.S. 282 (1893), Judge Gierke first ruled that Congress had not created a "new office" when "Law Officers" became "Military Judges" in the Military Justice Act of 1968 and thus no new appointment was necessary. *United States v. Weiss*, 36 M.J. at 228. Alternatively, he concluded that, if a new office had been created, the duties of the military judge were "germane" to those duties already required of a military officer with legal training.

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[2]A petition for writ of certiorari in *Graf* was filed on December 29, 1992 (No. 92-1102), and it is incorporated by reference. In the interest of completeness, this petition will summarize the *Graf* decision, as well as the reasons for granting review of the due process issue.

"The principle we glean from *Shoemaker* is that Congress may create a new office . . . and give a military officer the duties of that office without making a new appointment necessary, if the new duties are 'germane'." *Id.*

Judge Crawford eschewed the opinion of Judge Gierke, and concurred only in the result. In her view the appointment of military judges need not comply with the Appointments Clause at all because of the special deference given to Congress when it regulates the land and naval forces. Her opinion does not mention *Buckley v. Valeo*, 424 U.S. 1, 132 (1976) (per curiam), in which this Court held that no class or type of officer is excluded from the reach of the Appointments Clause because of the special nature of their office or the plenary power of Congress over the subject area. Additionally, Judge Crawford reached her conclusion even though the Department of Justice (appearing as an *amicus* below, urging affirmance) disavowed that position in both its brief and at oral argument.

Chief Judge Sullivan and Judge Wiss each filed dissenting opinions rejecting the arguments described above. The dissenters found no broad exemption to the strictures of the Appointments Clause based on the judges' status as military officers or military lawyers. Chief Judge Sullivan stressed the watershed events of the Military Justice Act of 1968 which for the first time created a "*professional judiciary*" in the military. *United States v. Weiss*, 36 M.J. at 251. He recognized that what had occurred was no mere transfer of duties, but was a clear break from past practice by creating the new offices of military trial and appellate judges. Judge Wiss disagreed with the lead opinion's application of *Shoemaker* to this case, in particular its assertion that the assignment of specific and highly responsible judicial duties as a military judge is "germane to officers in general," i.e., to the duties of the entire Judge Advocate General's Corps from which military judges are chosen. *United States v. Weiss*, 36 M.J. at 262.

The court did not revisit *Graf* where it had overruled Graf's due process objection to the lack of fixed terms of office for military judges for two reasons. First, *Graf* rejected the balancing test set forth in *Matthews v. Eldridge*, 424 U.S. 319 (1976), which had long been used to resolve Fifth Amendment due process claims. Instead, the court used the less exacting Fourteenth Admendment due process standard enunciated in *Medina v. California*, 112 S.Ct. 2572 (1992), which involved review of a state criminal conviction. Second, *Graf* treated dicta from *United States ex rel. Toth v. Quarles*, 350 U.S. 11 (1955), and *Palmore v. United States*, 411 U.S. 389 (1973), as approving the lack of fixed terms of office, and announced a new rule that military judges could not be removed in retaliation for their judicial decisions. Nowhere did the Court of Military Appeals suggest that military necessity precluded fixed terms for military judges generally, let alone for those who sit on the Courts of Military Review in the Washington, D.C., area, or for courts-martial that are held in peacetime.

REASONS FOR GRANTING THE WRIT

This case raises fundamental questions about the quality of justice in the armed forces. Long established practices are challenged, practices which this Court has found unconstitutional in other criminal jurisdictions. The perception has grown, however, that similar relief cannot be obtained by this petitioner because he is a military member and this Court applies a separate and more stringent test for military litigants seeking relief from this Court. In the paragraphs that follow, petitioner attempts to establish that the same justice afforded his civilian counterpart, facing similar criminal charges, could have been granted to him, without impairing the national defense or violating established constitutional precedents governing military law.

I

MINIMAL DUE PROCESS UNDER THE FIFTH AMENDMENT REQUIRES THAT NO PERSON FACING FELONY CHARGES BE SUBJECTED TO THE POSSIBLE LOSS OF LIFE OR LIBERTY BASED UPON A NONUNANIMOUS VERDICT OF A JURY PANEL CONSISTING OF LESS THAN SIX PERSONS REGARDLESS OF JURISDICTION, MILITARY OR CIVILIAN.

It is anomalous that a Sixth Amendment right to a six-person jury, voting unanimously, can be extended through the "due process" clause of the Fourteenth Amendment to individuals facing criminal prosecution in state civilian jurisdictions, but that same jury protection cannot be given to military members under the "due process" clause of the Fifth Amendment.[3] If Congress and state legislatures cannot deprive civilian citizens of this fundamental due process right, how can Congress deprive the military citizen the same protection? Basing the distinction in treatment on military necessity, national security or Congressional whim is neither logical nor consonant with experience.

Shortly after the Uniform Code of Military Justice was enacted, and long before military members gained the right to directly petition the Supreme Court, this Court addressed due process claims by military members in the context of habeas corpus proceedings. Chief Justice Vinson, writing for the Court said, "The military courts, like the state courts have the

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[3]A concurrence of two-thirds of its voting members is sufficient to convict an accused in a military court-martial, unless the offense is classified capital, in which case a unanimous vote is required. Uniform Code of Military Justice arts. 51 (a), 52 (a), 10 U.S.C. §§ 851 (a), 852 (a). If the required vote to convict is not achieved, an acquittal results, hence, there are no "hung juries" in military courts.

same responsibilities as do the federal courts to protect a person from of a violation of his constitutional rights." *Burns v. Wilson*, 346 U.S. 137, 142 (1953). Justice Douglas added (though writing in a dissenting opinion):

> [N]ever have we held that all the rights covered by the Fifth and Sixth Amendments were abrogated by Art. I, § 8, cl. 14 of the Constitution, empowering Congress to make rules for the armed forces. I think it plain from the text of the Fifth Amendment that position is untenable.

Id. at 152. This recognition goes to the core of petitioner's claim. Even if the Sixth Amendment does not directly extend the right to jury trial to military members, once military courts are formed with "jurors" certain fundamental due process rights must be met. Thus, the size, composition and voting methods of military juries are subject to due process analysis.

In *Mendrano v. Smith*, 797 F.2d 1538 (10th Cir. 1986), a similar claim was addressed. In a habeas corpus proceeding, the court considered a military premeditated murder and rape conviction tried before a military jury consisting of six persons, as opposed to the five in petitioner's case.[4] The court concluded that no due process right was denied after noting, "this appeal presents close and troubling questions[.]" *Id.* at 1547. In the opinion, the court reviewed this Court's precedents as they related to civilian jurisdictions and the constitutional and legislative history of military courts-martial.

Citing *Ballew v. Georgia*, 435 U.S. 223 (1978) ("Justice Blackmun, writing for the plurality, concluded that a unanimous conviction by a five-person jury for a non-petty offense

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[4] A general court-martial must consist of "a military judge and not less than five members." Uniform Code of Military Justice art. 16(1), 10 U.S.C. § 816(1). The accused may request trial before a military judge alone.

violated an accused's right to jury trial"), and *Burch v. Louisiana*, 441 U.S. 130 (1979) ("conviction for a non-petty offense by only five members of a six-person jury" held unconstitutional) as persuasive authority favoring the habeas petitioner, Mendrano, the court felt bound by this Court's decisions dating back to *Ex parte Milligan*, 71 U.S. [4 Wall.] 2 (1866), which have consistently held that the Sixth Amendment right to jury trial does not extend to military members. The cited cases included *O'Callahan v. Parker*, 395 U.S. 258, 261 (1969), *Whelchel v. McDonald*, 340 U.S. 122, 127 (1950), *Ex parte Quirin*, 317 U.S. 1, 40 (1942), and *Kahn v. Anderson*, 255 U.S. 1, 8 (1921).

Furthermore, in evaluating the due process question, the court in *Mendrano v. Smith*, 797 F.2d at 1545, felt bound to render appropriate deference to Congress in fulfilling their duty to balance the rights of men in uniform against the "overriding demands of discipline" of this "specialized society." The court concluded, given Congress' determination that a minimum of five members voting by two-thirds majority would suffice for court-martial, "this balancing does not seem constitutionally impermissible." *Id.* at 1546. Petitioner respectfully challenges these conclusions and suggests that closer scrutiny of the logic and precedents is necessary.

The *Mendrano* court could not explain in 1979, nor can the government demonstrate now that the ability to "fight and win wars" would in any way be impaired by extending to military members the right, enjoyed by their fellow citizens, to juries consisting of at least six members who must reach their verdicts unanimously. The military justice system has changed dramatically in the last twenty-five years, just as Chief Judge Sullivan noted in his dissent in the *Weiss* decision. 36 M.J. at 251. Procedural and evidentiary rules parallel federal and state rules in many ways. Constitutional, federal and state precedents are routinely cited and relied upon in applying these

rules. Wars ~~have~~ been fought with these rules in place and no credible authority can be cited for the proposition that extending these new rights to service men and women jeopardized the ability of the armed forces to fight and win.

The government has not shown that military juries, drawn from the ranks of professional soldiers, sailors and airmen, are somehow better trained or equipped than their civilian counterparts to decide factual questions of guilt and/or adjudge sentences. When this Court has determined that fairness under the constitution requires a minimum of six jurors, voting unanimously in a non-petty criminal proceeding, given the current state of military justice, how can it justify anything less in a military tribunal? This question begs to be answered.

There is more. The due process violation in petitioner's case was further compounded by the fact that Airman Webber, an African-American, faced an all-white jury panel of five officers. In an attempt to obtain a panel fairly representative of the racial makeup of the community and large enough to satisfy the concerns expressed in *Ballew v. Georgia*, petitioner's defense counsel requested that the jury consist of a minimum of twelve members after challenges, that he be granted two additional peremptory challenges and that at least one-third of the jury be comprised of African-Americans. All these requests were denied.

When a single young African-American female was added to the panel, the defense felt compelled to challenge her for cause because she had been a rape victim. This superficial attempt to bring balance to the court in no way satisfied this Court's concerns as expressed in *Strauder v. West Virginia*, 100 U.S. 303 (1880), *Taylor v. Louisiana*, 419 U.S. 522 (1975), *Duren v. Missouri*, 439 U.S. 357 (1979), and *Batson v. Kentucky*, 476 U.S. 79 (1986).

The "fair cross section" precedents have not been applied to military courts, while the *Batson v. Kentucky* requirement

has. *See United States v. Hodge*, 26 M.J. 596 (A.C.M.R. 1988) (J. Smith, dissenting); and *United States v. McClain*, 22 M.J. 124 (C.M.A. 1975). In the military, no concerted effort is made to include minorities in the "pools" from which jurors are selected. Applying some, while ignoring other, precedents may occur because of the military's different methods of selecting "pools" from which individual jury panels are chosen. This incongruity may also be explained by the difficulty a military accused faces in obtaining evidence to establish "systematic" exclusion of minorities from jury pools. For whatever reason, the result is most disturbing. In effect, military prosecutors are able to circumvent the holding in *Batson* simply by making no effort to include minorities in the "pool."

In terms of the jury selection and challenge process, applying some of this Court's precedents while rejecting others inevitably results in a failure to achieve the goals of due process and equal protection. The exclusion of minorities from military juries, whether systematic or not, when combined with the small size of the juries and the two-thirds voting requirement, significantly reduces the likelihood that African-American servicemen and women will enjoy the same level of justice as their fellow caucasian servicemembers. Certainly the perception will remain.

In conclusion, Airman Webber has been deprived the constitutional protections this Court recognzied in *Ballew v. Georgia*, *Burch v. Louisiana*, and *Strauder v. West Virginia*. Consistent with this Court's opinion in *Burns v. Wilson*, this denial of fundamental due process warrants review and relief.

II

OUTWARDLY INNOCENT ACTS LACKING ANY INCULPATORY CONNECTION BETWEEN A PURPORTED SUSPECT AND THE COMMISSION OF A CRIME, STANDING ALONE, SHOULD NOT SUFFICE TO ESTABLISH THE PROBABLE CAUSE NECESSARY TO JUSTIFY THE ISSUANCE OF A

SEARCH WARRANT UNDER THE FOURTH AMENDMENT.

Military courts follow this Court's standards in resolving questions regarding the determination of probable cause. Therefore, the "totality of the circumstances test" in *Illinois v. Gates*, 462 U.S. 213, 233 (1983), governed the trial and lower appellate courts' resolution of petitioner's motion to suppress evidence seized in the course of two searches of his dormitory room. Petitioner maintains that the military magistrate who issued the search "authorization" of his dormitory room did not have a "substantial basis" for determining that a "fair probability" existed that evidence relating to the rape and sexual assault of Airman Nantkes would be found therein.[5]

The facts used to justify the existence of probable cause did not link petitioner to the commission of the crime. His contact with Airman Nantkes the evening before the assault was totally innocent and unrelated to any criminal activity on his part. At best, this contact may have justified questioning petitioner, given its proximity in time to the assault, but nothing more. Airman Nantkes' inability to describe her assailant made the investigators' task of finding her assailant difficult. But it also made the establishment of probable cause impossible without additional facts or evidence to identify a suspect. *See generally Henry v. United States*, 361 U.S. 98 (1959) (outwardly innocent acts insufficient to establish probable cause to arrest). Under the circumstances as they existed before Airman Webber's room was searched, there was inad-

[5] While not raised as an issue before this Court, the conduct of the search authorities was challenged in the lower appellate courts in a petition for new trial (based on fraud on the court), which was denied. Discrepancies in the OSI investigative reports, handling of evidence and statements made by Special Agent Walker, the agent who sought the search authorization, join to make the lawfulness of this search even more suspect.

equate information in the authorities' hands to justify arresting anyone or searching anywhere.

The Air Force Court of Military Review implicitly, if not explicitly, recognized that the contact on the evening of September 11th was "an innocent transaction and was not inculpatory." (Appendix B, at 4). While the court used those words when evaluating the note found in the second search of petitioner's room, the same logic applies to the pre-assault "contact." In effect, the court held that anyone and everyone who knocked on Airman Nantkes' door the evening before she was assaulted automatically became a suspect and was therefore subject to being arrested and searched. Even the "common sense" standard of *Illinois v. Gates* does not reach that far.

This error is so egregious and the analysis of the lower court so flawed, the searches of Airman Webber's room must be addressed and declared constitutionally inadequate.

III

EXCULPATORY SEROLOGICAL EVIDENCE PRESENTED BY THE PROSECUTION WAS MISCONSTRUED AND MINIMIZED BY THE LOWER COURTS, RENDERING THE FINDINGS OF GUILTY LEGALLY INSUPPORTABLE IN LIGHT OF THIS COURT'S TEST FOR LEGAL SUFFICIENCY AS ARTICULATED IN *JACKSON V. VIRGINIA*, 443 U.S. 307 (1979).

Consider the prosecution's case. Airman Nantkes was unable to identify her assailant. None of the physical evidence found in her room could be conclusively linked to petitioner. The government attempted to establish that serological tests of semen found in the room were "consistent" with tests of petitioner's blood and saliva, without excluding him as the assailant. Essentially, the case hinged on the nightgown found

in Airman Webber's room, which was discovered eighteen hours after the assault.

Given these facts, if, in truth, the serological evidence tended to support the conclusion that Airman Webber was *not* the source of the semen found in Airman Nantkes' room, thereby excluding him as the assailant, then whatever appearances may exist from having found a nightgown hidden under a cushion in petitioner's room, "no rational trier of fact could have found proof of guilt beyond a reasonable doubt." *Jackson v. Virginia*, 433 U.S. at 324.

The Air Force Court of Military Review described the serological evidence as "collateral: it does not identify the offender, and it does not exclude Airman Webber as a suspect (despite his suggestion that it might)." Then, in two lines, without further analysis, the court concluded that the evidence was sufficient to convict, having previously cited *Jackson v. Virginia*. (Appendix B, at 5).

The court's brief analysis is troubling in light of the evidence that the serological tests in fact tended to do just what the petitioner claimed—exclude him as the source of the semen. When the serology reports and the expert's testimony at trial are read, a few pertinent and significant facts emerge. The serologist testified that Airman Webber is a secretor, which means that his blood group substances are secreted into and carried by other bodily fluids, including semen. He further stated that semen and blood have the same typings 99.9 percent of the time. Airman Webber's blood possessed Lewis type a+b+ and PGM enzyme 2+1+. Neither of these typings were found to exist in any of the semen samples taken from the sheets, towels or nightshirt admitted into evidence.

Yet, sufficient samples of semen existed to provide PGM and Lewis readings of 1+ and a-b+, respectively. Airman Nantkes did not testify that there was more than one assailant or sources of semen. Therefore, when the government's ex-

pert, Kr. Kotowski, testified that if there were only one source, then Airman Webber would have to be excluded, it is inconceivable that Airman Webber could be declared the source by the trier of fact or anyone else.

While the serological evidence cannot account for or explain the nightgown (which did not have any semen stains) found in Airman Webber's room, it does contradict his guilt with respect to the actual physical assault. With the evidence in this state, petitioner's conviction is legally insupportable and must be reversed.

IV

THE METHOD OF APPOINTING MILITARY OFFICERS TO DUTY AS TRIAL AND APPELLATE JUDGES VIOLATES THE APPOINTMENTS CLAUSE OF THE CONSTITUTION AND THE LACK OF ANY FIXED TERM FOR THOSE JUDICIAL OFFICES VIOLATES THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT.

This petition, like *United States v. Weiss*, seeks to establish minimum standards for the appointment of military judges and their retention in office for fixed terms. It does not seek to have the Uniform Code of Military Justice or the military justice system mirror that of Article III courts. Rather, it seeks to ensure that the separation of powers requirements embodied in the Appointments Clause, and the notions of fundamental fairness embodied in the Due Process Clause of the Fifth Amendment, are available to those who are tried by courts-martial. Taken alone, either the Appointments Clause or the Due Process violations would seriously undermine the fairness of the military justice system, but occurring together they call into question whether anyone in the armed forces can receive the minimal level of judicial independence that every justice system requires.

A. The Appointments Clause Violation

> Not since *Solorio v. United States*, 483 U.S. 435, 107 S.Ct. 2924, 97 L.Ed.2d 364 (1987), has an appeal presented questions of such fundamental importance to the institutional integrity and viability of the military justice system as does this one.

United States v. Weiss, 36 M.J. at 256-57 (Wiss, J., dissenting).

The Appointments Clause precludes Congress from placing the power to appoint inferior officers in anyone other than the President alone, the Courts of Law, or the Heads of Departments. U.S. Const. Art. II, § 2, Cl. 2. *Freytag v. Commissioner*, 111 S.Ct. 2631 (1991). There can be little doubt that military judges, who exercise extraordinary authority and discretion, are Officers of the United States and are subject to the Appointments Clause. *See Buckley v. Valeo*, 424 U.S. 1, 126 (1976) (per curiam). No judge of the Court of Military Appeals disagreed with that proposition except Judge Crawford and her position was specifically disavowed by the Department of Justice.

There is considerable force to the argument that military appellate judges are "superior" or "principal" officers, in which case the President must appoint them with the advice and consent of the Senate. But in any event, both military trial and appellate judges are at least inferior officers, so they must be appointed either by the President, the Head of a Department, or by a Court of Law. No court has held that military judges are appointed to their judicial offices by any of the authorities listed in the Appointments Clause; the only question is whether their appointment as military judges, after they have been duly appointed as military officers must be made by one of the authorities set forth in that clause.

The Appointments Clause preserves "the Constitution's structural integrity by preventing the diffusion of the appoint-

ment power." *Freytag*, 111 S.Ct. at 2638. As the Court reasoned in *Freytag*:

> The Appointments Clause prevents Congress from dispensing power too freely; it limits the universe of eligible recipients of the power to appoint. Because it articulates a limiting principle, the Appointments Clause does not always serve the Executive's interests. *For example, the Clause forbids Congress from granting the appointment power to inappropriate members of the Executive Branch.* Neither Congress nor the Executive can agree to waive this structural protection . . . The structural interests protected by the Appointments Clause are not those of any one Branch of government but of the entire Republic.

Freytag, 111 S.Ct. at 2639 (emphasis added).[6]

Relying on *Shoemaker*, two Court of Military Appeals judges found that the Appointments Clause had been satisfied because all military judges are commissioned officers of the Armed Forces, having been appointed by the President and confirmed by the Senate, although they have not been appointed to their judicial positions in that manner. Apparently recognizing that a presidential appointment had *some* limits—a Deputy Secretary of Defense could not simply move over to become the Assistant Attorney General for Antitrust or a Member of the Equal Opportunity Commission—the opinion also concluded that there was no new office created when Congress amended the Uniform Code of Military Justice in

[6] A predictable consequence of having appointments made by an intermediate official, such as the Judge Advocate General, instead of by persons authorized by the Appointments Clause, is the homogeneity of the judges of the Courts of Military Review. Thus, the 35 current appellate judges include only two women and one African-American. The only two civilians sit on the five-member Coast Guard Court.

1968 to create the positions of military trial and appellate judges because the new positions were simply continuations of the old ones, with some modest changes. Even if that assessment were correct, and petitioner agrees with the dissenters that it is not, that would at most allow those who were in a judicial position in 1968—the "incumbent[s]" in *Shoemaker's* words (147 U.S. at 301)—to continue in office without a new appointment. Stated another way, *Shoemaker* can at most solve the problem for those who were already serving in judicial positions in 1968, not for those who were yet to be appointed as judges, let alone those who were not yet military lawyers.

As a fall-back, Judges Gierke and Cox argued that, under *Shoemaker*, Congress can add duties to an *existing* office without requiring that the person then in office be reappointed, so long as the "new" duties are "germane" to the "old" ones of that office. What they overlook is that *Shoemaker* arose in a one-time situation where Congress had added duties to persons who were already in offices to which they had been properly appointed. But there would never be a problem for future occupants of those offices since they would be appointed to positions encompassing both the "new" and "old" duties. However, for military judgeships, the problem is repeated whenever a non-judge military lawyer replaces a military judge who retires or is transferred to a new assignment inside or outside the judiciary.

Even if *Shoemaker* allowed those who were serving as "law officers" in 1968 to continue in the new office of military judge, those who became military judges thereafter would fail to meet *Shoemaker's* "germaneness" test. The duties and powers of military judges, including all of those involved in petitioner's case, are so different from those of prosecutor, defense counsel, or legal advisor to a command—which is what most military lawyers do before they become military

judges—that there is not simply an addition of a related duty, as in *Shoemaker,* but a substitution of a new job, with entirely new functions, for an old one. Surely, no one would contend that the two civilians on the Coast Guard Court of Military Review could be plucked from civilian life, even if they were administrative law judges working for the federal government, and placed on the court without meeting the requirements of the Appointments Clause; the result should be no different for any other military judge, whether at the trial or appellate level. Similarly, no one would assume that a member of the staff of the General Counsel of the National Labor Relations Board could simply be "assigned" the additional duties of administrative law judge at that agency without satisfying the requirements of the Appointments Clause, yet that is the effect of the rulings below. Indeed, as both *Buckley* and *Freytag* make clear, it is the function that the individual is performing that is decisive in determining whether the Appointments Clause applies at all, and under that analysis there can be no question that military judges must be separately appointed because their functions differ so markedly from those performed by other military lawyers. At the very best, these quite expansive extensions of *Shoemaker* raise serious questions that this Court should address.

The decision below rests on even shakier ground because the decisive vote was cast by Judge Crawford. She implicitly rejected an extension of *Shoemaker* in favor of a much more sweeping rationale: that the Appointments Clause does not apply at all to military judges, although her rationale would lead to the conclusion that the Clause does not apply to any appointments in the armed forces. Her reasoning conflicts with, but does not even attempt to distinguish, *Buckley*, which made clear that there are no subject-matter exemptions from the Appointments Clause based on Congress's interest in, or plenary power over particular subject areas. Judge Crawford's

rationale also conflicts with decisions like *Rostker v. Goldberg*, 453 U.S. 57 (1981), and *Middendorf v. Henry*, 425 U.S. 25 (1976), which stand for the proposition that there are no wholesale exemptions from the Constitution simply because the case involves military affairs. Indeed, so extreme is Judge Crawford's reasoning that the Department of Justice, which appeared below as an *amicus* in support of respondent, specifically rejected that position in its brief and at oral argument. It is highly unlikely that Judge Crawford would have taken the far more expansive route to affirming petitioner's conviction if she had been willing to accept the rationale put forward by Judge Gierke. Thus, if her "deference to Congress" analysis is in error—as it clearly seems to be—there were insufficient votes to sustain petitioner's conviction on a principled basis.

In this case it is not simply that the Judge Advocates General, who appoint military judges, are not listed in the Appointments Clause, but they are the supervisors of all military lawyers who serve in military courtrooms, including all of those who prosecute criminal cases on behalf of the United States. In addition, the Judge Advocates General, or the Assistant Judge Advocates General, write the annual fitness reports of the members of each service's Court of Military Review, which are then used to decide the appellate judges' promotions, future duty assignments, and susceptibility to involuntary early retirement. Indeed, the due process implications of this particular appointment arrangement raise independent concerns that strongly reinforce the Appointment Clause objections.

The validity of the appointment of military judges under the Appointments Clause is a significant constitutional question which the Court should address immediately. The 2-1-2 division within the Court of Military Appeals attests to the serious debate on the merits of the issues. A split in the circuits is unlikely ever to arise, because the question has been fully and

fairly litigated and resolved by the military justice system, thus potentially insulating it from review on habeas corpus. *See generally, Watson v. McCoffer*, 782 F.2d 143, 145 (10th Cir.), *cert. denied*, 476 U.S. 1184 (1986). In any event, as it did in *Freytag*, this Court should grant review now to resolve the dispute as promptly as possible.

B. The Due Process Violation

The reasons the Court should grant review on the second question presented are set out in the previously-filed *Graf* petition and are only summarized below. But first, it is worth noting that, although the two questions presented arise under different constitutional provisions, the defects involve common concerns of accountability and fundamental fairness to an accused. Noncompliance with each of the provisions is magnified by the lack of compliance with the other, such that there is a synergistic impact on the accused's rights. To further compound the problem, the Judge Advocate General can both appoint and remove military judges, yet he is also responsible for supervising the efficient working of the military justice system, including its prosecutors.

The lower court's application of *Medina's* Fourteenth Amendment due process analysis to a *federal* Fifth Amendment due process claim is ample reason to hear the case. Indeed, in *Medina* this Court left open the correctness of one of its prior decisions—*United States v. Raddatz*, 447 U.S. 667, 677 (1980)—which had applied *Matthews v. Eldridge* to a due process challenge to a federal criminal conviction. Petitioner believes that respect for state legislative judgments and concerns of federalism, which loomed so large in *Medina*, have no place where federal due process rights are at issue, but the uncertainty created by *Medina* underscores the need for this Court to settle an issue that only it can resolve. In that regard, we also note that the concerns about overturning

specific judgments made by state legislatures (*Medina*), or with those made by Congress for the Armed Forces (*Middendorf v. Henry*), are inapplicable here because there is no evidence that in 1968, when Congress established the offices of military trial and appellate judge, it gave any thought to terms of office, let alone specifically legislated to preclude them.

Certainly, in time of war or other serious exigency, military necessity may require some adjustments regarding the tenure of trial judges, although not for the appellate judges who comprise the four Courts of Military Review. Moreover, neither the government nor the Court of Military Appeals has sought to justify the lack of any fixed term of office on grounds of military necessity. Instead, the Court of Military Appeals relied on other claimed protections against improper retaliation against military judges for unpopular decisions—some of which it first announced in *Graf*—although none of them can be invoked by an accused, even if they were actually, as opposed to theoretically, available to the judges themselves. But even if those protections served to prevent naked retaliation, they cannot possibly guard against the more subtle and virtually undetectable chilling influences of adverse or "faint praise" fitness reports that can have significant impacts on promotions, future assignments, and susceptibility to involuntary early retirement for all military judges.

At bottom, the Court of Military Appeals fell woefully short of justifying a massive exception to the generally accepted principle of American jurisprudence that judicial independence for those who preside at criminal trials and hear criminal appeals is an absolute minimum protection for an accused, as reflected in such due process cases as *Tumey v. Ohio*, 274 U.S. 510 (1927), and in the nearly universal fact that state judges serve for fixed terms of office. The due process issue alone is sufficiently important to warrant plenary consideration by this Court, especially because the terms of office of a military

judge can be cut short by a military officer who is the ultimate superior of both the judge and the prosecutor.

CONCLUSION

The questions presented are genuinely important and affect not only petitioner, but the rights of millions of Americans serving in the armed forces. The cumulative impact of the constitutional appointments and due process errors in petitioner's case warrants this Court's attention, consideration and action. For all the reasons stated, the petition for a writ of certiorari should be granted.

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November 1993

APPENDICES

APPENDIX A

UNITED STATES COURT OF MILITARY APPEALS

USCMA Dkt. No. 68527/AF
CMR Dkt. No. 29239

UNITED STATES, APPELLEE

v.

PRINCE S. J. WEBBER (454-29-2291), APPELLANT

ORDER

On consideration of the petition for grant of review of the decision of the United States Air Force Court of Military Review and the petition for new trial, in light of *United States v. Weiss*, 36 MJ 224 (CMA 1992), *cert. granted*, 61 U.S.L.W. 3787 (U.S. May 24, 1993) (No. 92-1482), it is by the Court this 12th day of August, 1993

ORDERED:

That the petition for grant of review is hereby granted on Issues IX and X raised by appellate defense counsel;

That the petition for new trial is denied; and

That the decision of the United States Air Force Court of Military Review is affirmed.

For the Court,

/s/ John A. Cutts, III
Deputy Clerk of the Court

cc: The Judge Advocate General of the Air Force
Appellate Defense Counsel (JIVIDEN) Spinner
Appellate Government Counsel (PETERSON)

APPENDIX B

UNITED STATES AIR FORCE COURT
OF MILITARY REVIEW

ACM 29239

UNITED STATES

v.

AIRMAN FIRST CLASS PRINCE S. J. WEBBER,
FR454-29-2291, UNITED STATES AIR FORCE

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14 July 1992

Sentence adjudged 10 January 1991 by GCM convened at Kirtland Air Force Base, New Mexico. Military Judge: Mark DeRuyter.

Approved Sentence: Dishonorable discharge, confinement for 40 years, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for the Appellant: William J. Holmes, Esq. (argued), Colonel Jeffrey R. Owens, and Captain Michael D. Burt.

Appellate Counsel for the United States: Captain James C. Sinwell (argued), Lieutenant Colonel Brenda J. Hollis, and Captain Stephen R. Irwin.

Before

LEONARD, RIVES, and JAMES
Appellate Military Judges

OPINION OF THE COURT

JAMES, Judge:

Airman First Class Webber we convicted of rape, larceny, burglary, and indecent assault, all arising from the same incident.[1] The members of the general court-martial sentenced him to be discharged from the service with a dishonorable discharge, to be confined for 40 years, to forfeit all pay and allowances, and to be reduced to E-1. On appeal he renews objections to the evidence obtained in two searches, he complains for the first time that the military judge should have instructed on alibi, and he contests the sufficiency of the evidence and the severity of the sentence. We find no error and affirm the convictions and the sentence.

I. Facts

The victim of the rape, Airman N, went to sleep at about 2200 in her room in a woman's dormitory at Kirtland Air Force Base. Not long afterwards, she was awakened by a stranger at her door. When she asked who was at the door, the visitor said "Webber." It was the appellant, Airman Webber, who had visited to tell her that her window blinds were open. Airman Webber left, and Airman N returned to sleep.

At about 0400, Airman N was awakened by a man in her room. He soon covered her head with a pillow case, and she was never able to give more than a general description of him. The intruder raped Airman N repeatedly and then left, taking with him the nightgown she had worn and towels they had used. Airman N telephoned for help at about 0515. The window of her room had been damaged, suggesting a forced entry.

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[1] Violations of Articles 120, 121, 129, and 134, UCMJ, 10 U.S.C. §§ 920, 921, 929, and 934 (1988).

Meanwhile, Airman Webber was required to be at his job at 0600. He testified that he arose at about 0445 in his own room in a different barracks to prepare, rode his bicycle to work, and was present before 0600.

By the next evening investigators had a composite identification drawing of the first visitor, a general description of the suspect, and a place to start: the transient airmen's quarters near Airman N's dormitory. They went there and eventually knocked on Airman Webber's door. When he appeared, they immediately recognized that he resembled the composite drawing. Asked if he knew anyone who resembled the composite picture, Airman Webber said Yes and took the investigators to a room occupied by people who bore no resemblance to it. When the investigators asked for identification, they recognized Airman Webber's name as the one given to the victim by her earlier visitor. After Airman Webber was told when the event being investigated occurred, he spontaneously gave the details of his visit to Airman N's room. They asked his consent to a search of his room, but he denied it. The investigators sought and were granted authorization to search (the military version of a warrant) his room for the gown, the towels, and a man's jacket described by Airman N. They found the gown in Airman Webber's room. The investigators testified that when they found the gown, Airman Webber exclaimed spontaneously, "Oh, shit!" The investigators then sought and were granted a further authorization to search for other evidence. Then they found a note with Airman N's name on it in handwriting, later found to be written by Airman Webber.

Airman Webber was not questioned and gave no further statements. He testified at trial, admitting the earlier visit to Airman N's room but denying the second visit and all the charges. He gave no explanation of how the gown got into his room. Thus, the conviction in this case depends on the testimony that the gown worn by the victim and stolen by the assailant was found in Airman Webber's room.

II. Two Searches

Lacking consent or some other exception to the preference for a warrant, military investigators must obtain authorization before searching a private place. If they do not, the evidence may be excluded. Mil. R. Evid. 311(a), 315(a). An accused may contest the admissibility of such evidence by objecting at trial before pleas, Mil. R. Evid. 311(d)(2)(A); R.C.M. 915(b)(3), and Airman Webber did so, objecting to the products of both searches. The burden to show compliance with Mil. R. Evid. 315 is upon the usual proponent of such evidence, the prosecution, by a preponderance of the evidence. Mil. R. Evid. 311(e)(1); R.C.M. 915(c). The parties litigated the issues thoroughly,[2] and the Mil. R. Evid. 311(d)(4); R.C.M. 915(d). He then overruled both objections, and the gown and note were both admitted against Airman Webber.[3]

A. First Search & The Gown

When we examine a suppression decision, we must first decide what facts to consider. In general, an appellate court should not set aside factual determinations of a trial court (on matters other than guilt) unless they are clearly erroneous. *See*

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[2] During the course of the litigation, the chief defense counsel called his assistant defense counsel as a witness to testify as to an inconsistent statement previously given by an investigator at a prior hearing. This practice should be avoided in advance and discouraged at the time. *See* Air Force Rules of Professional Responsibility, rule 3.7 (4 December 1989); ABA Model Rules of Professional Conduct, rule 3.7 and commentary; *see also United States v. Kellam*, 2 M.J. 338 (A.F.C.M.R. 1976). However, we detect no prejudice to the appellant in this case. Article 59(a), UCMJ, 10 U.S.C. § 859(a) (1988).

[3] The military judge managed the litigation of these and other motions well, producing a transcript which lends itself to orderly examination and, equally important, which shows that the issues received orderly consideration at trial.

generally United States v. Burris, 21 M.J. 140, 143 n.7 (C.M.A. 1985). However, we may, if warranted, decide the facts for ourselves. Article 66(c), UCMJ, 10 U.S.C. § 866(c) (1988); *United States v. Cole*, 31 M.J. 270, 272 (C.M.A. 1990). Thus, we can adopt the military judge's findings of fact in his "essential findings," or we can reach our own. The findings of fact in this case are supported by the record, and we adopt them as our own.

We must now decide what standard governs our review of the decisions of the commander who authorized the search and of the trial judge. Though it often appears from appellate decisions that the review is de novo, we are reminded that "[a] magistrate's 'determination of probable cause should be paid great deference by reviewing courts.' " *Illinois v. Gates*, 462 U.S. 213, 236 (1983) (quoting *Spinelli v. United States*, 393 U.S. 410, 419 (1969). Instead, "the duty of a reviewing court is simply to ensure that the magistrate had 'a substantial basis for . . . conclud[ing]' that probable cause existed." 362 U.S. 257, 271 (1960); *United States v. Wood*, 25 M.J. 46, 48 (C.M.A. 1987). *See generally United States v. Postle*, 20 M.J. 632, 641-42 (N.M.C.M.R. 1985). When examining that decision, one looks at the totality of the circumstances. *Gates; Wood*, 25 M.J. at 47. Thus, we review the commander's decision to determine whether it was reasonable and based in fact.

It is evident though never explicitly stated that the investigators and the commander suspected that the person who visited Airman N's room first was likely also to be the assailant. It is clear that all believed the gown to have been taken by the assailant, and it was reasonable to believe that the assailant would still have it. The composite picture identified Airman Webber as the visitor and, by inferences, as the suspect. Thus, we find that the authorization to search for the gown in Airman Webber's room had a substantial basis in the facts

reported to the commander. The commander's belief that the gown would probably be found there was reasonable. It was not error to deny the motion to suppress it.

B. Second Search & The Note

Appellant's most appealing argument about the second search, which produced the note bearing Airman N's name, is that the second authorization was void for overbreadth. However, the note was consistent with the story that Airman Webber told the investigators about going to Airman N's room to warn her of her open blinds. Thus, while it linked him to the victim, it did so in connection with an innocent transaction and was not inculpatory. We do not reach the overbreadth argument because, even assuming an error, we find, beyond a reasonable doubt, that admission of the note added only neutral evidence that could not have had any prejudicial effect. Article 59(a), UCMJ, 10 U.S.C. § 859(a) (1988); *Chapman v. California*, 386 U.S. 18 (1967); *United States v. Ward*, 1 M.J. 176 (C.M.A. 1975).

III. Alibi Instruction

Airman Webber gave his schedule for the early morning on the day of the rape, from which one might infer that he could not have done all that was described and still have had time to go to Airman N's room, commit the repeated rapes, and return to his own room. He contends on appeal that the military judge should have instructed on alibi as a theory of defense, even though he never asked for such an instruction at trial and did not object at trial to its omission. Even assuming that alibi is reasonably raised by the evidence, his assignment of error is without merit: his failure to request the instruction at trial waived it. R.C.M. 920(e), (f); *United States v. Bigger*, 2 U.S.C.M.A. 297, 8 C.M.R. 97, 102 (1953); *United States v.*

Boyd, 17 M.J. 562 (A.F.C.M.R. 1983), *pet. denied*, 18 M.J. 28 (C.M.A. 1984); *United States v. Hughes*, 7 C.M.R. 803, 808-809 (A.F.B.R. 1953); *See also United States v. Moore*, 15 U.S.C.M.A. 345, 35 C.M.R. 317, 320 (1965); *United States v. Martin*, 15 C.M.R. 796, 805 (A.F.B.R. 1954); *United States v. Stafford*, 22 M.J. 825, 828 (N.M.C.M.R. 1986); *United States v. Houser*, 7 C.M.R. 336, 342 (A.B.R. 1953); *United States v. Watson*, 6 C.M.R. 261, 267 (A.B.R. 1952); *United States v. Brown*, 4 C.M.R. 342, 349 (A.B.R. 1952). *See generally United States v. Jones*, 7 M.J. 441, 443 n.1 (C.M.A. 1979).

IV. Factual Sufficiency

"The test for [legal sufficiency] is whether, considering the evidence in the light most favorable to the prosecution, a reasonable fact-finder could have found all the essential elements beyond a reasonable doubt." *United States v. Turner*, 25 M.J. 324, 324 (C.M.A. 1987) (citing *Jackson v. Virginia*, 443 U.S. 307 (1979)). The test for factual sufficiency is "whether, [we] are [ourselves] convinced of the accused's guilt beyond a reasonable doubt." *Turner*, 25 M.J. at 325.

Airman Webber has presented the case to us in the light most beneficial to his position, *cf. United States v. Harris*, 34 M.J. __, __ n.3 (C.M.A. 1992), as he has the right to do, but the evidence taken in context and as a whole is convincing. Though Airman Webber emphasizes the difficulty of analyzing serological evidence, the serology is collateral: it does not identify the offender, and it does not exclude Airman Webber as a suspect (despite his suggestion that it might). There was ample evidence to support the findings in this case, and we are ourselves convinced beyond a reasonable doubt that Airman Webber is guilty of all specifications and charges.

V. Sentence Appropriateness

Airman Webber also complains that the sentence is unduly severe. We have examined the record, the convictions, and the sentence, giving due consideration to the characteristics of this offender and to the crimes of which he was convicted.

United States v. Healy, 26 M.J. 394 (C.M.A. 1988); *United States v. Wingart*, 27 M.J. 128 (C.M.A. 1988); *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982); *United States v. Ciulla*, 29 M.J. 868 (A.F.C.M.R. 1989), *aff'd*, 32 M.J. 186 (C.M.A. 1991), *cert. denied*, __ U.S. __, 116 L. Ed. 2d 135, 112 S. Ct. 172 (1991). We note that the evidence suggests enough careful deliberation to get into the room surreptitiously and to make away with some of the incriminating evidence, and it shows callous abuse. Counterbalancing Airman Webber's good military service is the extensive psychological trauma inflicted upon the victim. If it might be said that he had a good career, it might also be said that the lingering effects of his abuse deprived her of her good career. We are satisfied that the sentence is not inappropriate.[4]

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[4] When deciding what action to take on a case, a convening authority has the recommendations of his staff judge advocate. R.C.M. 1106, 1107(b)(3)(A)(ii). The staff judge advocate's advice in this case included some that was mistaken. Using a standard form designed for the purpose, the staff judge advocate completed a block entitled "maximum imposable sentence for offenses convicted upon" (Air Force Form 242 (January 1985), item 34) by entering "DD Conf x 40 years, TF, Red to E-1," an abbreviated statement of the sentence adjudged. The maximum which might have been adjudged was (because of the violations of Article 120, UCMJ, 10 U.S.C. § 920 (1988)) imprisonment for life. This is the third time that we have noted that the legend for the block is ambiguous. *See United States v. Wilson*, 33 M.J. 512, 513 n.2 (A.F.C.M.R. 1991) ("imposable" probably means after consideration of multiplicity); *United States v. Williams*, —— M.J. ——, —— n.15 (A.F.C.M.R. 1992). We assume that "maximum imposable sentence" refers to the maximum which might be adjudged at trial, not to the maximum which would be approved by the convening authority on review. Were it not so, the entry would always be "as adjudged," for no more than was adjudged may ever be approved. R.C.M. 1107(d). Then the block would be meaningless, contributing nothing to the convening authority's decisionmaking. This error was waived by the omission of the defense to note it when replying to the staff judge advocate's recommendations, R.C.M. 1106(f)(6). We note that it could not have had any effect adverse to appellant. However, the recurrence of such an error suggests that practitioners need some help with the form.

The findings of guilty and the sentence are correct in law and fact and, on the basis of the entire record,[5] are

AFFIRMED.

Senior Judge LEONARD and Judge RIVES concur.

[SEAL]

OFFICIAL

/s/ Naomi D. Allen
NAOMI D. ALLEN
TSgt, USAF
Chief Court Administrator, AFCMR

[5] In these days of transcripts faintly printed with tired dot-matrix ribbons we are happy to have had the benefit of a letter perfect transcript perfectly printed with dark, dense print on high quality paper and well assembled and bound in sensibly divided volumes. We appreciate the reporter's careful work.

APPENDIX C

Relevant portions of the Uniform Code of Military Justice (UCMJ)

UCMJ Art. 6, 10 U.S.C. § 806 Judge Advocates and legal officers

(a) The assignment for duty of judge advocates of the Army, Navy, Air Force, and Coast Guard shall be made upon the recommendation of the Judge Advocate General of the armed force of which they are members. The assignment for duty of judge advocates of the Marine Corps shall be made by direction of the Commandant of the Marine Corps. The Judge Advocate General or senior members of his staff shall make frequent inspection in the field in supervision of the administration of military justice.

(b) Convening authorities shall at all times communicate directly with their staff judge advocates or legal officers in matters relating to the administration of military justice; and the staff judge advocate or legal officer of any command is entitled to communicate directly with the staff judge advocate or legal officer of a superior or subordinate command, or with the Judge Advocate General.

UCMJ Art. 16, 10 U.S.C. § 816 Courts-martial classified

The three kinds of courts-martial in each of the armed forces are—

(1) general courts-martial, consisting of—

(A) a military judge and not less than five members; or

(B) only a military judge, if before the court is assembled the accused, knowing the identity of the military judge and after consultation with defense counsel requests orally on the record or in writing a court com-

posed only of a military judge and the military judge approves;

(2) special courts-martial, consisting of—

(A) not less than three members; or

(B) a military judge and not less than three members; or

(C) only a military judge; if one has been detailed to the court, and the accused under the same conditions as those prescribed in clause (1)(B) so requetss; and

(3) summary courts-martial, consisting of one commissioned officer.

UCMJ Art. 26, 10 U.S.C. § 826 Military judge of a general or special court-martial

(a) A military judge shall be detailed to each general court-martial. Subject to regulations of the Secretary concerned, a military judge may be detailed to any special court-martial. The Secretary concerned shall prescribe regulations providing for the manner in which military judges are detailed for such courts-martial and for the persons who are authorized to detail military judges for such courts-martial. The military judge shall preside over each open session of the court-martial to which he has been detailed.

(b) A military judge shall be a commissioned officer of the armed forces who is a member of the bar of a Federal court or a member of the bar of the highest court of a State and who is certified to be qualified for duty as a military judge by the Judge Advocate General of the armed force of which such military judge is a member.

(c) The military judge of a general court-martial shall be designated by the Judge Advocate General, or his designee, of the armed force of which the military judge is a member for detail in accordance with regulations prescribed under subsec-

tion (a). Unless the court-martial was convened by the President or the Secretary concerned, neither the convening authority nor any member of his staff shall prepare or review any report concerning the effectiveness, fitness, or efficiency of the military judge so detailed, which relates to his performance of duty as a military judge. A commissioned officer who is certified to be qualified for duty as a military judge of a general court-martial may perform such duties only when he is assigned and directly responsible to the Judge Advocate General, or his designee, of the armed force of which the military judge is a member and may perform duties of a judicial or nonjudicial nature other than those relating to his primary duty as a military judge of a general court-martial when such duties are assigned to him by or with the approval of that Judge Advocate General or his designee.

(d) No person is eligible to act as military judge in a case if he is the accuser or a witness for the prosecution or has acted as investigating officer or a counsel in the same case.

(e) The military judge of a court-martial may not consult with the members of the court except in the presence of the accused, trial counsel, and defense counsel, nor may he vote with the members of the court.

UCMJ Art. 37, 10 U.S.C. § 837 Unlawfully influencing action of court

(a) No authority convening a general, special, or summary court-martial, nor any other commanding officer, may censure, reprimand, or admonish the court of any member, military judge, or counsel thereof, with respect to the findings or sentence adjudged by the court, or with respect to any other exercises of its or his functions in the conduct of the proceedings. No person subject to this chapter may attempt to coerce or, by any unauthorized means, influence the action of a court-martial or any other military tribunal or any member thereof,

in reaching the findings or sentence in any case, or the action of any convening, approving, or reviewing authority with respect to his judicial acts. The foregoing provisions solely for the purpose of instructions given in open court by the military judge, president of a special court-martial, or counsel.

(b) In the preparation of an effectiveness, fitness, or efficiency report or any other report or document used in whole or in part for the purpose of determining whether a member of the armed forces is qualified to be advanced, in grade, or in determining the assignment or transfer of a member of the armed forces or in determining whether a member of the armed forces should be retained on active duty, no person subject to this chapter may, in preparing any such report (1) consider or evaluate the performance of duty of any such member of a court-martial, or (2) give a less favorable rating or evaluation of any member of the armed forces because of the zeal with which such member, as counsel, represented any accused before a court-martial.

UCMJ Art. 66, 10 U.S.C. 866

(a) Each Judge Advocate General shall establish a Court of Military Review which shall be composed of one or more panels, and each such panel shall be composed of not less than three appellate military judges. For the purpose of reviewing court-martial cases, the court may sit in panels or as a whole in accordance with rules prescribed under subsection (f). Any decision of a panel may be reconsidered by the court sitting as a whole in accordance with such rules. Appellate military judges who are assigned to a Court of Military Review may be commissioned officers or civilians, each of whom must be a member of a bar of a Federal court or the highest court of a state. The Judge Advocate General shall designate as chief judge one of the appellate military judges of the Court of

Military Review established by him. The chief judge shall determine on which panels of the court the appellate judges assigned to the court will serve and which military judge assigned to the court will act as the senior judge on each panel.

(c) In a case referred to it, the Court of Military Review may act only with respect to the findings and sentence as approved by the convening authority. It may affirm only such findings of guilty and the sentence or such part or amount of the sentence, as it finds correct in law *and fact* and determines, on the basis of the entire record, should be approved. In considering the record, it may *weigh the evidence, judge the credibility of witnesses*, and *determine controverted questions of fact*, recognizing that the trial court saw and heard the witnesses.

(f) The Judge Advocates General shall prescribe uniform rules of procedure for Courts of Military Review and shall meet periodically to formulate policies and procedure in regard to review of court-martial cases in the office of the Judge Advocates General and by Courts of Military Review.

(g) No member of a Court of Military Review shall be required, or on his own initiative be permitted, to prepare, approve, disapprove, review, or submit, with respect to any other member of the same or another Court of Military Review, an effectiveness, fitness, or efficiency report, or any other report documents used in whole or in part for the purpose of determining whether a member of the armed forces is qualified to be advanced in grade, or in determining the assignment or transfer of a member of the armed forces, or in determining whether a member of the armed forces shall be retained on active duty.

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In the Supreme Court of the United States

OCTOBER TERM, 1993

PRINCE S.J. WEBBER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES

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BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Whether the Constitution permits the use of a court-martial panel consisting of five members who may convict on a vote of two-thirds of the members.

2. Whether the facts relied upon as a basis for issuance of the search authorization in this case established probable cause.

3. Whether the evidence was sufficient to support petitioner's conviction.

4. Whether the Judge Advocate General of an Armed Force, who is not authorized to make appointments under the Appointments Clause of the Constitution, may appoint commissioned officers to serve as military trial and appellate judges.

5. Whether military trial and appellate judges must be appointed to their judicial duties for fixed terms.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	5
Conclusion	18

TABLE OF AUTHORITIES

Cases:

Ballew v. *Georgia*, 435 U.S. 223 (1978)	5, 14
Branford v. *United States*, 356 F.2d 876 (7th Cir. 1966)	7
Burch v. *Louisiana*, 441 U.S. 130 (1979)	5, 14, 15
Burns v. *Wilson*, 346 U.S. 137 (1953)	9
De War v. *Hunter*, 170 F.2d 993 (10th Cir. 1948), cert. denied, 337 U.S. 908 (1949)	8, 15
Dynes v. *Hoover*, 61 U.S. (20 How.) 65 (1858)	7
Hutchinson v. *United States*, 18 M.J. 281 (C.M.A.), cert. denied, 469 U.S. 981 (1984)	7
Jackson v. *Taylor*, 353 U.S. 569 (1957)	14
Jackson v. *Virginia*, 443 U.S. 307 (1979)	13
Kahn v. *Anderson*, 255 U.S. 1 (1921)	7-8
King v. *Moseley*, 430 F.2d 732 (10th Cir. 1970)	7
Martin v. *Mott*, 25 U.S. (12 Wheat.) 19 (1827)	10
Mendrano v. *Smith*, 797 F.2d 1538 (10th Cir. 1986)	7, 8, 13, 15
Milligan, Ex parte, 71 U.S. (4 Wall.) 2 (1866)	7, 8
O'Callahan v. *Parker*, 395 U.S. 258 (1969)	7
Owens v. *Markley*, 289 F.2d 751 (7th Cir. 1961)	7-8
Quirin, Ex parte, 317 U.S. 1 (1942)	7, 8
Reid v. *Covert*, 354 U.S. 1 (1957)	7
Rostker v. *Goldberg*, 453 U.S. 57 (1981)	9
Solorio v. *United States*, 483 U.S. 435 (1987)	7, 9

Cases—Continued: Page

Stout v. *Hancock*, 146 F.2d 741 (4th Cir. 1944), cert. denied, 325 U.S. 850 (1945) 11
United States v. *Allen*, 31 M.J. 572 (N.-M.C.M.R. 1990), aff'd, 33 M.J. 209 (C.M.A. 1991), cert. denied, 112 S. Ct. 1473 (1992) 7
United States v. *Carter*, 25 M.J. 471 (C.M.A. 1988) 15
United States v. *Curtis*, 32 M.J. 252 (C.M.A.), cert. denied, 112 S. Ct. 406, remanded, 33 M.J. 101 (C.M.A. 1991), cert. denied, 112 S. Ct. 1177 (1992) 7
United States v. *Guilford*, 8 M.J. 598 (A.C.M.R. 1979), petition for review denied, 8 M.J. 242 (C.M.A. 1980) ... 14
United States v. *Mason*, 24 M.J. 127 (C.M.A.), cert. denied, 484 U.S. 912 (1987) 7
United States v. *McClain*, 22 M.J. 124 (C.M.A. 1986) ... 7, 15
United States v. *Palenius*, 2 M.J. 86 (C.M.A. 1977) 14
United States v. *Santiago-Davila*, 26 M.J. 380 (C.M.A. 1988) 15
United States ex rel. Toth v. *Quarles*, 350 U.S. 11 (1955) 12
Whelchel v. *McDonald*, 340 U.S. 122 (1950) 7, 9
Williams v. *Florida*, 399 U.S. 78 (1970) 15

Constitution, statutes, regulation, and rule:

U.S. Const.:
Art. 1, § 8, Cl. 14 8-9
Art. II, § 2, Cl. 2 (Appointments Clause) 18
Art. III 8
§ 2 ..... 7, 8
Cl. 3 7
Amend. V 7, 8
Due Process Clause 8
Amend. VI 7, 8, 15
Act of Apr. 23, 1800, ch. 33, § 1, art. 41, 2 Stat. 51 11
Act of July 17, 1862, ch. 204, art. 19, 12 Stat. 605 11
Act of June 4, 1920, ch. 227, art. 43, 41 Stat. 795-796 11

Statutes, regulation, and rule—Continued: Page

American Articles of War of 1776, *reprinted in* 1 & 2 W. Winthrop, *Military Laws and Precedents* (2d ed. 1920):
§ 14:
art. 1 9
art. 5 10
American Articles of War of 1806, ch. 20, § 1, 2 Stat. 359:
art. 64, 2 Stat. 367 10
art. 87, 2 Stat. 369 11
American Articles of War of 1874, *reprinted in* 1 & 2 W. Winthrop, *Military Law and Precedents* (2d ed. 1920): 11
art. 75 10
art. 96 11
American Articles of War of 1916, ch. 418, art. 5, 39 Stat. 651 10
Uniform Code of Military Justice, 10 U.S.C. 801 *et seq.*:
Art. 16, 10 U.S.C. 816 (1982 & Supp. V 1987) 10
Art. 16(1)(A), 10 U.S.C. 816(1)(A) (1982 & Supp. V 1987) 12
Art. 25, 10 U.S.C. 825 (1982 & Supp. V 1987) 14
Art. 52(a), 10 U.S.C. 852(a) 11
Art. 52(a)(2), 10 U.S.C. 852(a)(2) (1982 & Supp. V 1987) 12
Art. 66(c), 10 U.S.C. 866(c) 13, 14
Art. 67(c), 10 U.S.C. 867(c) (Supp. IV 1992) 6
Art. 67a(a), 10 U.S.C. 867a(a) (Supp. IV 1992) 6
Art. 120, 10 U.S.C 920 2
Art. 121, 10 U.S.C. 921 2
Art. 129, 10 U.S.C. 929 2
Art. 134, 10 U.S.C. 934 2
28 U.S.C. 1259(3) (Supp. IV 1992) 6
Exec. Order No. 12,550, 3 C.F.R. 192 (1986 comp.) 12
Mil. R. Evid. 311(b)(3) 17

Miscellaneous: Page

H.R. Rep. No. 491, 81st Cong., 1st Sess. (1949) 11
Henderson, *Courts-Martial and the Constitution: The Original Understanding*, 71 Harv. L. Rev. 293 (1957) ... 8
Hirschhorn, *The Seperate Community: Military Uniqueness and Servicemen's Constitutional Rights*, 62 N.C. L. Rev. 177 (1984) 15
5 J. Continental Cong. 801 (W. Ford ed. 1906) 10
30 J. Continental Cong. (J. Fitzpatrick ed. 1934):
p. 145 9
p. 316 9
A. Macomb, *A Treatise on Martial Law and Courts-Martial* (1809) 11
Manual for Courts-Martial (1986) 12
Van Loan, *The Jury, the Court-Martial, and the Constitution*, 57 Cornell L. Rev. 363 (1972) 8, 10
1 & 2 Winthrop, *Military Law and Precedents* (2d ed. 1920) 12

In the Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-736

PRINCE S.J. WEBBER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the Court of Military Appeals (Pet. App. 1a) is unreported. The opinion of the Air Force Court of Military Review (Pet. App. 2a-10a) is unreported.

JURISDICTION

The judgment of the Court of Military Appeals was entered on August 12, 1993. The petition for a writ of certiorari was filed on November 9, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1259(3) (Supp. IV 1992).

STATEMENT

Petitioner, a member of the United States Air Force, was convicted after a general court-martial of rape, larceny, burglary, and indecent assault, in violation of Articles 120, 121, 129, and 134 of the Uniform Code of Military Justice, 10 U.S.C. 920, 921, 929, and 934. He was sentenced to a dishonorable discharge, confinement for 40 years, forfeiture of all pay and allowances, and reduction to the lowest enlisted grade. The convening authority approved the findings and sentence. The Air Force Court of Military Review affirmed the findings and sentence. Pet. App. 3a. The Court of Military Appeals granted discretionary review on two issues, which are raised before this Court in Questions 4 and 5 above, but it denied the petition for new trial and otherwise affirmed the decision of the court of military review. *Id.* at 1a.

The victim of the rape and the other charged offenses, Airman Linda Jean Nantkes, lived in a women's dormitory at Kirtland Air Force Base in New Mexico. On September 11, 1990, she went to sleep at about 10 p.m. in her room. Soon afterward she was awakened by a knock at her door. She asked who was at the door. Her visitor answered with a muffled reply that sounded like "It's Webber." On opening the door the victim saw a black man, later determined to be petitioner, who told her that her windows were open. When she said her windows were not open, the man said, "Well, I mean your shades or your blinds are open." Nantkes said, "Okay," and shut the door. She went to the shades, which were open just a crack, but not enough that someone could see into her room.

Nantkes then returned to her bed and went to sleep. Tr. 225-227, 253-254.

At about 4:30 a.m., Nantkes awoke to find a man standing by her bed touching her groin area. She could not see the man well, but believed him to be a black man. The assailant covered her mouth, turned her onto her stomach, and raped her. Tr. 228-229, 236. The assailant then put a pillowcase over her head before turning her back over on her back and raping her a second time. Tr. 229-231. After forcing her to shower with him, the pillowcase still over her head, the assailant covered her head with a towel and raped her a third time. Tr. 232-234. Nantkes subsequently noticed that the nightgown she had been wearing before the attack was missing from her room. Tr. 238.

Although Nantkes was unable to identify her assailant, she was able to describe the person who announced himself as "Webber" when he knocked at her door the previous night. Tr. 226-227. She also was able to assist the agents in creating a composite picture of that person. She described him as black, about 20 years old, about 5'3" to 5'5" tall, and of slender build. Tr. 227, 238, 259-260; Pros. Exh. 4. In addition, she testified that she perceived the accent of the assailant's voice as that of a black man; that when the assailant forced her to put her arms around him she perceived his height to be similar to hers, 5'4"; and that his build was slender. Tr. 227, 230, 233.

Agents investigating the incident learned that male servicemembers from a dormitory across the street often frequented the women's dormitory. Tr. 260-261. The agents then conducted a door-to-door inquiry at the men's dormitory. One of the agents encountered petitioner and recognized him as the person depicted

in the composite picture that had been prepared from Nantkes' description of the man who had visited her on the night of the rape. Tr. 259, 261. When asked if he knew anyone who matched the composite picture, petitioner said that the picture looked like a man who had been living in a room down the hall. None of the occupants of that room matched the picture. Tr. 262.

Upon interviewing petitioner, the agents learned that his last name was Webber. Tr. 262. In the course of discussion with one of the agents, petitioner said that on the previous night he had walked by the women's dormitory across the street from the transients' dormitory; that he noticed an individual who appeared to be looking at a woman undressing in the window of the female dormitory; that as he approached, the individual walked off; and that he knocked on the woman's door and informed her that her shades were open. Tr. 263. The agents then obtained oral probable cause search authority—the military equivalent of a warrant—to search petitioner's room for, among other items, the missing nightgown. Tr. 263-264. In the course of the ensuing search, the agents found the nightgown under a seat cushion in petitioner's apartment. When the agents found the gown, petitioner exclaimed spontaneously, "Oh, shit!" Tr. 264, 294. The agents then sought and obtained a further authorization to search for other evidence related to the rape. They then found a handwritten note containing Nantkes' name. The note was written in petitioner's handwriting. Tr. 264-265, 331.

Physical evidence from the crime scene was seized and later examined. A serologist testified that, by using the ABO test, he determined that the semen

found on the victim's nightshirt matched petitioner's saliva type.[1] Tr. 307-309. On the basis of that test, the serologist testified that 75% of black males could be excluded as the originators of the stains, but that petitioner could not be excluded. Tr. 309. A second type of test did not establish a match between the samples at the crime scene and the fluid sample taken from petitioner. The serologist offered three possible explanations for that result: that the semen stains did not originate from petitioner; that the pertinent enzymes detected in the second test had deteriorated by the time of the test; or that the samples that were tested were of a different substance, such as vaginal fluid. Tr. 308, 319-320.

ARGUMENT

1. Petitioner argues (Pet. 14-18) that he was denied due process because he was tried and convicted by a jury of fewer than six members who were not required to reach their verdict by a unanimous vote. Citing *Burch* v. *Louisiana*, 441 U.S. 130 (1979), which invalidated a conviction for a non-petty offense by only five members of a six-person jury, and *Ballew* v. *Georgia*, 435 U.S. 223 (1978), which invalidated a conviction for a non-petty offense by a five-person jury, petitioner argues that the same standards should apply to the military justice system and that his conviction should therefore be reversed.

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[1] The serologist testified that while most secretors have saliva and seminal typing consistent with their blood typing, that was not true in petitioner's case. The serologist therefore based his analysis on a comparison of petitioner's saliva sample and the specimens of semen obtained from the crime scene. Tr. 304; Pros. Exh. 8, at 2.

a. Petitioner's complaints about the makeup of the court-martial panel were not raised before the Air Force Court of Military Review. Moreover, although they were argued in the petition for grant of review to the Court of Military Appeals, those claims were not among the issues that the Court of Military Appeals accepted for review. Accordingly, it is not clear that those issues are subject to review by certiorari in this Court.

The statutes providing certiorari review of the judgments of the Court of Military Appeals, 10 U.S.C. 867a(a) (Supp. IV 1992) and 28 U.S.C. 1259(3) (Supp. IV 1992), restrict this Court's certiorari jurisdiction to "[d]ecisions" of the Court of Military Appeals. Article 67a(a) of the UCMJ, 10 U.S.C. 867a(a) (Supp. IV 1992), further provides that this Court may not review by certiorari "any action of the Court of Military Appeals in refusing to grant a petition for review." The Court of Military Appeals has the statutory authority to limit decisions in any case to less than all the issues urged by the defendant. Article 67(c), UCMJ, 10 U.S.C. 867(c) (Supp. IV 1992). Since that court did not pass on those questions, there is a question whether that court rendered a "[d]ecision" on those questions within the meaning of the statutes authorizing this Court to review judgments of the Court of Military Appeals.

b. On the merits, there is no force to petitioner's constitutional challenge to the five-member court-martial panel or to the statutory authorization for nonunanimous verdicts in the military criminal justice system. The courts that have examined the question have uniformly upheld the military practice of convening court-martial panels with as few as five

members and the military practice of requiring only a two-thirds vote of the members to convict. See *Mendrano* v. *Smith*, 797 F.2d 1538 (10th Cir. 1986); *United States* v. *Allen*, 31 M.J. 572 (N.-M.C.M.R. 1990), aff'd, 33 M.J. 209 (C.M.A.), cert. denied, 112 S. Ct. 1473 (1992); *United States* v. *Curtis*, 32 M.J. 252 (C.M.A.), cert. denied, 112 S. Ct. 406, remanded on other grounds, 33 M.J. 101 (C.M.A. 1991), cert. denied, 112 S. Ct. 1177 (1992); *United States* v. *Mason*, 24 M.J. 127, 128 & n.* (C.M.A.), cert. denied, 484 U.S. 912 (1987); *Hutchinson* v. *United States*, 18 M.J. 281 (C.M.A.), cert. denied, 469 U.S. 981 (1984); see *United States* v. *McClain*, 22 M.J. 124, 128 (C.M.A. 1986).

Those decisions are correct. The statutes governing the number of members on court-martial panels and the number that must concur to return a verdict do not offend either the Fifth or the Sixth Amendment to the Constitution.

Petitioner seeks to impose on courts-martial the same requirements that Art. III, § 2, Cl. 3, and the Sixth Amendment impose in civilian cases. It is well settled, however, that the right to a jury trial that is guaranteed by those provisions does not apply to court-martial proceedings. *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 123 (1866); *Dynes* v. *Hoover*, 61 U.S. (20 How.) 65, 79 (1858).[2] The Fifth Amendment specif-

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[2] See also *O'Callahan* v. *Parker*, 395 U.S. 258 (1969), overruled on other grounds, *Solorio* v. *United States*, 483 U.S. 435 (1987); *Reid* v. *Covert*, 354 U.S. 1, 19 (1957) (plurality opinion); *Whelchel* v. *McDonald*, 340 U.S. 122, 127 (1950); *Ex parte Quirin*, 317 U.S. 1, 40-41 (1942); *Kahn* v. *Anderson*, 255 U.S. 1 (1921); *Mendrano* v. *Smith*, 797 F.2d at 1544; *King* v. *Moseley*, 430 F.2d 732, 734 (10th Cir. 1970); *Branford* v. *United States*, 356 F.2d 876, 877 (7th Cir. 1966); *Owens* v. *Markley*, 289 F.2d

ically exempts "cases arising in the land or naval forces" from the requirement of an indictment by a grand jury for serious crimes. By drafting the Fifth Amendment in that manner, "the framers of the Constitution, doubtless, meant to limit the right of trial by jury, in the sixth amendment, to those persons who were subject to indictment or presentment in the fifth." *Ex parte Milligan*, 71 U.S. (4 Wall.) at 123. As the Court explained in *Ex parte Quirin*, 317 U.S. 1, 39 (1942), neither Section 2 of Article III of the Constitution nor the Sixth Amendment requires a trial by jury in the military, because those provisions were intended "to preserve unimpaired trial by jury in all those cases in which it had been recognized by the common law * * *, but not to bring within the sweep of the guaranty those cases in which it was then well understood that a jury trial could not be demanded as of right." Accordingly, because petitioner had no Article III or Sixth Amendment right to a trial by a petit jury, he also had no right under those provisions to a unanimous vote by a jury composed of at least six persons.

Petitioner's claim fares no better under the Due Process Clause. The Constitution authorizes Congress to "make Rules for the Government and Regulation of the land and naval Forces," Art. I, § 8,

751, 752 (7th Cir. 1961). See *De War* v. *Hunter*, 170 F.2d 993, 997 (10th Cir. 1948), cert. denied, 337 U.S. 908 (1949) (court-martial panel composed exclusively of officers to try an enlisted man does not violate the Sixth Amendment). See generally Van Loan, *The Jury, the Court-Martial, and the Constitution*, 57 Cornell L. Rev. 363 (1972); Henderson, *Courts-Martial and the Constitution: The Original Understanding*, 71 Harv. L. Rev. 293 (1957).

Cl. 14, and grants Congress "primary responsibility for the delicate task of balancing the rights of servicemen against the needs of the military." *Solorio* v. *United States*, 483 U.S. 435, 447 (1987). See also *Burns* v. *Wilson*, 346 U.S. 137, 140 (1953) (plurality opinion). Congress's judgment about the composition and voting procedures of a court-martial is entitled to special deference, not only because "[t]he constitution of courts-martial, like other matters relating to their organization and administration * * *, is a matter appropriate for congressional action," *Whelchel* v. *McDonald*, 340 U.S. 122, 127 (1950),[3] but also because the practices at issue have been carried forward from the earliest days of our nation. Cf. *Solorio* v. *United States*, 483 U.S. at 447.

The nation's first military law was the American Articles of War of 1776. 1 & 2 W. Winthrop, *Military Law and Precedents* 47, App. 961-971 (2d ed. 1920). Section 14, Art. 1, provided that at least 13 officers would serve on general courts-martial. Several years later, when large numbers of desertions and an understaffing of officers had become a particularly acute problem for commanders at frontier outposts, Congress amended the American Articles of War to permit a quorum of five officers at a general court-martial when 13 members could not be detailed "without manifest injury to the service." 30 J. Continental Cong. 145, 316 (J. Fitzpatrick ed. 1934); 1 & 2 W. Winthrop, *supra*, at 22-23, App. 972; Van Loan, *The Jury, the Court-Martial, and the Constitution*, 57

[3] See also *e.g.*, *Rostker* v. *Goldberg*, 453 U.S. 57, 64-65 (1981) (the decisions of Congress are entitled to particular deference when they involve "Congress' authority over national defense and military affairs").

Cornell L. Rev. 363, 384-385 n.118 (1972). As a result, court-martial panels often consisted of fewer than 13 members. See *Martin* v. *Mott*, 25 U.S. (12 Wheat.) 19, 34-35 (1827).

Congress endorsed that practice throughout the 19th century and the early part of the 20th century when revising the Articles of War. 1 & 2 W. Winthrop, *supra*, at 77, 159; American Articles of War of 1806, ch. 20, § 1, art. 64, 2 Stat. 367, *reprinted* in 1 & 2 W. Winthrop, *supra*, App. 981-982; American Articles of War of 1874, art. 75, *reprinted in* 1 & 2 W. Winthrop, *supra*, App. 992; American Articles of War of 1916, ch. 418, art. 5, 39 Stat. 651. In the aftermath of World War II, Congress replaced the Articles of War with the Uniform Code of Military Justice. In so doing, Congress retained the requirement of a quorum of five members for general courts-martial, as well as the convening authority's discretion to detail a greater number of panel members, the system that exists today. Art. 16, UCMJ, 10 U.S.C. 816 (1982 & Supp. V 1987).

History also shows that unanimous verdicts have never been a necessary element of court-martial proceedings. The American Articles of War of 1776, like their predecessor, the British Articles of War, required only a simple majority vote to convict a defendant and a two-thirds majority to sentence him to death. American Articles of War of 1776, § 14, art. 5, *reprinted in* 5 J. Continental Cong. 801 (W. Ford ed. 1906); 1 & 2 W. Winthrop, *supra*, at 377, App. 968; A. Macomb, *A Treatise on Martial Law and Courts-Martial* 144 (1809). Congress thereafter repeatedly endorsed similar majority vote requirements in stat-

utes passed in 1800, 1806, 1862, and 1874.[4] Throughout the nineteenth century, a majority vote of the panel members was sufficient to convict a defendant of a noncapital crime, with a two-thirds vote sufficient to impose capital punishment. 1 & 2 W. Winthrop, *supra*, at 377; *Stout* v. *Hancock*, 146 F.2d 741, 742-743 (4th Cir. 1944), cert. denied, 325 U.S. 850 (1945).

Early in the 20th century, Congress modified the voting requirements for Army courts-martial, requiring a unanimous vote to impose the death penalty or to convict a defendant of a crime carrying a mandatory death penalty. Act of June 4, 1920, ch. 227, art. 43, 41 Stat. 795-796; *Stout* v. *Hancock*, 146 F.2d at 741-743. For all other crimes, conviction required only a two-thirds majority. At the same time, the voting requirements for courts-martial in the Navy were left untouched. Thus, only a simple majority was necessary to convict a sailor, and a two-thirds majority to impose the death penalty. See H.R. Rep. No. 491, 81st Cong., 1st Sess. 26, 74 (1949). When considering the UCMJ following World War II, Congress adopted Article 52(a) of the UCMJ, 10 U.S.C. 852(a), in substantially its present form, so that an accused may be convicted on a two-thirds vote of the court-martial panel, except in the case of an

[4] Act of Apr. 23, 1800, ch. 33, § 1, art. 41, 2 Stat. 51 (An Act for the better government of the Navy of the United States); American Articles of War of 1806, ch. 20, § 1, art. 87, 2 Stat. 369, *reprinted in* 1 & 2 W. Winthrop, *supra*, App. 984; Act of July 17, 1862, ch. 204, art. 19, 12 Stat. 605 (An Act for the better Government of the Navy of the United States); American Articles of War of 1874, art. 96, *reprinted in* 1 & 2 W. Winthrop, *supra*, App. 994.

offense carrying a mandatory penalty of death, in which event the panel must be unanimous.

In 1986, the President modified the *Manual for Courts-Martial* to limit the imposition of the death penalty to those cases in which the court-martial panel members unanimously find the defendant guilty of an offense for which Congress has authorized the death penalty, and then only if the court finds at least one enumerated aggravating factor. Rule 1004, *Manual*; Exec. Order No. 12,550, 3 C.F.R. 192 (1986 comp.). Neither Congress nor the President sought to extend the unanimity requirement to other situations, however. In sum, it is clear that the five-member, two-thirds majority vote procedures in Articles 16(1)(A) and 52(a)(2) of the UCMJ, 10 U.S.C. 816(1)(A) and 852(a)(2) (1982 & Supp. V 1987), represent the longstanding and considered judgment of Congress and the Executive on the proper balance to be struck between the rights of an individual serviceman and the special needs of the armed forces.

That judgment is a reasonable one. The essential function of the military is "to fight or be ready to fight wars should the occasion arise." *United States ex rel. Toth* v. *Quarles*, 350 U.S. 11, 17 (1955). When servicemembers are diverted from that function by the need to serve as court-martial panel members, "the basic fighting purpose of armies is not served." *Ibid.* Congress therefore has determined that the diversion of resources necessary to conduct the retrials that would result from a unanimous verdict requirement is too high a price to pay in terms of lost military preparedness. Accordingly, Congress provided for only one trial, at which a two-thirds majority vote would suffice to convict.

That "one-trial" system does not exclusively favor the prosecution. The rule that no retrials are permitted in the military if there is a "hung jury" provides a defendant with "a significant recompense" for the disadvantages of not requiring a unanimous verdict. *Mendrano* v. *Smith*, 797 F.2d at 1546. Moreover, as a safeguard against an inaccurate verdict by a court-martial panel, the military courts have required the prosecution independently to prove the defendant's guilt before a court of military review. The standard of review applied by a court of military review to determine whether the evidence is sufficient to support the defendant's conviction substantially differs from, and is more generous to military defendants than, the standard employed by civilian appellate courts. A civilian appellate court does not inquire whether it believes that the evidence is sufficient to prove the defendant's guilt beyond a reasonable doubt, but instead only determines "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson* v. *Virginia*, 443 U.S. 307, 319 (1979) (emphasis in original). By contrast, a court of military review must independently review the record and be convinced of the correctness of the court-martial panel's findings, including its ultimate finding that the accused is guilty, before the findings may be upheld. Art. 66(c), UCMJ, 10 U.S.C. 866(c).[5]

[5] A court of military review may affirm "only such findings of guilty * * * as it finds correct in law and fact and determines, on the basis of the entire record, should be approved." Art. 66(c), UCMJ, 10 U.S.C. 866(c). Although nothing in the

Finally, petitioner argues that the nonunanimous verdict of a five-member court-martial violates due process because such a verdict is inherently unreliable. The court reached that conclusion for civilian cases based on the studies cited in the lead opinion in *Ballew* v. *Georgia*, 435 U.S. at 231-243 (opinion of Blackmun, J.), regarding the group dynamics of civilian juries. Much of the same reasoning formed the basis for the decision in *Burch* v. *Louisiana*, 441 U.S. at 138. There are no comparable studies, however, that have addressed the dynamics of courts-martial panels. In light of the functional and compositional differences between civilian juries and court-martial panels, the studies on which *Burch* and *Ballew* relied are not obviously applicable to the military setting. *United States* v. *Guilford*, 8 M.J. 598, 601-602 (A.C.M.R. 1979), petition for review denied, 8 M.J. 242 (C.M.A. 1980).[6] Given the special

text of the statute or its legislative history suggests that the courts of military review must independently apply the "beyond a reasonable doubt" standard to the record when reviewing the sufficiency of the evidence, see *Jackson* v. *Taylor*, 353 U.S. 569, 577 & n.8 (1957), the military courts have read that standard into the Act. *E.g.*, *United States* v. *Palenius*, 2 M.J. 86, 91 n.7 (C.M.A. 1977).

[6] In *Burch*, the Court concluded that juries must have at least six members, in part "to provide a fair possibility that a cross section of the community would be represented." 441 U.S. at 135, citing *Williams* v. *Florida*, 399 U.S. 78, 100 (1970). That goal is inapplicable to courts-martial. The members of a civilian jury are selected at random to represent a cross-section of the community. By contrast, the members of the court-martial panel are deliberately chosen on the basis of their qualifications to sit as panel members. Art. 25, U.C.M.J., 10 U.S.C. 825 (1982 & Supp. V 1987).

deference due to Congress's judgments in this area, the question whether studies of the type relied upon in *Ballew* justify a change in the UCMJ should be left to Congress. See Hirschhorn, *The Separate Community: Military Uniqueness and Servicemen's Constitutional Rights*, 62 N.C. L. Rev. 177 (1984).

c. There is also no merit to petitioner's claim regarding the method of selecting the court-martial members. A serviceman has no right to a court-martial panel randomly selected from a pool containing all servicemen, including enlisted personnel of the same rank as the defendant. *De War* v. *Hunter*, 170 F.2d 993, 997 (10th Cir. 1948), cert. denied, 337 U.S. 908 (1949) (court-martial panel composed exclusively of officers to try an enlisted man does not violate Sixth Amendment); *United States* v. *McClain*, 22 M.J. at 128 (Sixth Amendment cross-section requirement inapplicable to court-martial proceedings); see *Mendrano* v. *Smith*, 797 F.2d 1544-1547; *United States* v. *Carter*, 25 M.J. 471 (C.M.A. 1988); *United States* v. *Santiago-Davila*, 26 M.J. 380 (C.M.A. 1988).

As to petitioner's argument that minorities were unfairly underrepresented on petitioner's court-martial panel, there is no indication that there was any ethnic or racial bias in the process used to select the panelmembers for petitioner's court-martial. Indeed, two of the nine prospective panelmembers in this case were minorities. See Tr. 125-126. But petitioner challenged both of them—one for cause and the other peremptorily. Tr. 207, 211. Petitioner was therefore solely responsible for keeping the two minority members of the pool from being on his panel. See Tr. 125-126.

In short, petitioner presented no evidence of racial discrimination in the selection of court members, no evidence of the racial makeup of the base community, and no evidence of racial bias in the use of peremptory challenges. See Tr. 120-123, 211; App. Exh. X. Under those circumstances, petitioner has failed to show that there was any constitutional infirmity in the method by which his court-martial panel was selected.

2. Petitioner argues (Pet. 18-20) that the information on which the search authorization was granted did not amount to probable cause. His argument ignores the information known to the investigating agents and the reasonable inferences from that information.

The identification of petitioner as the late evening caller who told Nantkes (apparently falsely) that her blinds were open focused attention on him as a suspect. That focus was substantially enhanced by the match between the race and size of the late evening caller and the apparent race and size of the rapist, as reported by Nantkes. The force of that report was further enhanced by the fact that Nantkes reported that both the late evening caller and the rapist were approximately 5'4" in height—quite small for a man. Finally, the rapist took several items, including a nightgown, from Nantkes's room, and it was reasonable for the officers and the commander who authorized the search to conclude that there was probable cause that petitioner committed the rapes and that evidence would be found in petitioner's room. Because the showing of probable cause turned in part on the similarity between the identification of the late night caller and the rapist, it was not, as petitioner

claims, dependent entirely on innocent conduct that did not tend to identify petitioner as the rapist.

Even if the evidence known to the officers and conveyed to the commander at the time of the search authorization did not constitute probable cause, the question of probable cause was, at worst, a debatable one. It was therefore reasonable for the investigating officers to rely on the search authorization that they secured. For that reason, even if the search was not supported by probable cause, the nightgown and the note containing Nantkes's name would be admissible under Mil. R. Evid. 311(b)(3), the military equivalent of the good faith exception to the exclusionary rule.

3. Petitioner next asserts (Pet. 20-22) that the court of military appeals misunderstood the serological evidence and therefore failed to appreciate how strong that evidence was in supporting petitioner's claim of innocence. In fact, however, petitioner has not shown that the serological evidence significantly supported his claim of innocence, and he has failed completely to explain the highly incriminating physical evidence found in his room the day after the rapes.

Petitioner's argument regarding the serological evidence fails to acknowledge the serologist's testimony that petitioner's blood type did not match the type of his other body fluids. For that reason, the serologist compared the semen samples with petitioner's saliva specimen, not his blood specimen. For one of the two tests that the serologist conducted, petitioner's saliva type matched the semen specimen. For the other test, the two did not match, but the serologist explained that the failure of that test to produce a match could have been attributable to

deterioration of the pertinent enzyme in the sample or contamination of the sample by other fluids on the surfaces from which the samples were taken. Accordingly, the serologist's testimony did not exculpate petitioner at all. To the contrary, that evidence did nothing to rebut the powerful force of the other evidence in the case, including the physical evidence found in petitioner's room.

4. Finally, petitioner presents (Pet. 22-30) the two issues that are pending before this Court in *Weiss* v. *United States*, No. 92-1482 (argued Nov. 3, 1993). Those claims are: (1) that the military trial and appellate judges in his case were not qualified to hold those positions because they were appointed to them by the Judge Advocate General in violation of the Appointments Clause of the Constitution, Art. II, § 2, Cl. 2; and (2) that his trial and his appeal to the court of military review were fundamentally unfair because the military judges sitting on those courts do not enjoy fixed terms of office and can be reassigned to other military duties by the Judge Advocate General based on his evaluation of their performance as judges.

Because those questions are pending before the Court in *Weiss* v. *United States*, *supra*, the petition should be held until the Court has decided *Weiss* and should then be disposed of as appropriate in light of the Court's decision in that case.

CONCLUSION

With respect to questions 4 and 5, the petition for a writ of certiorari should be held pending this Court's decision in *Weiss* v. *United States*, No. 92-1482, and then disposed of as appropriate in light of the Court's

decision in that case. In all other respects, the petition should be denied.

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